

87-1424

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

COMMONWEALTH OF VIRGINIA, *ex rel.*
STATE BOARD OF ELECTIONS,

Petitioner,

v.

WILLIE B. KILGORE, DORIS McCONNELL, PATSY
BURCHETT, KATHERINE JONES McCLELLAND,
FAYE OWENS, ROGER ADAMS, EVELYN BACON,
PHILLIP CHEEK, the COUNTY OF LEE, VIRGINIA,
the COUNTY OF SCOTT, VIRGINIA, the REPUBLIC
INSURANCE COMPANY and the COMPASS IN-
SURANCE COMPANY,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTIONS PRESENTED

Does the First Amendment's prohibition against political patronage discharges from government employment apply where the evidence establishes that extreme political animosity and party antipathy may actually thwart the proper functioning of a small government office?

Should this Court certify to the Virginia Supreme Court a pure question of state law where the court of appeals' interpretation of that state law is clearly wrong and is disrupting well-settled state/local government relationships?

**LIST OF PARTIES REQUIRED
PURSUANT TO SUP. CT. R. 21.1(b)**

The appellants in the court below were Scott County Electoral Board members Katherine Jones McClelland, Faye Owens and Herman Stallard; Lee County Electoral Board members Roger Adams, Evelyn Bacon and Judy Carroll; Lee County General Registrar Phillip Cheek; the Commonwealth of Virginia, ex rel. State Board of Elections; and the Compass Insurance Company.

The appellees in the court below were Willie B. Kilgore, Doris McConnell and Patsy Burchett (plaintiffs in the district court). The remaining parties who were Appellants/Appellees in the court below were the County of Lee, Virginia; the County of Scott, Virginia; and the Republic Insurance Company.

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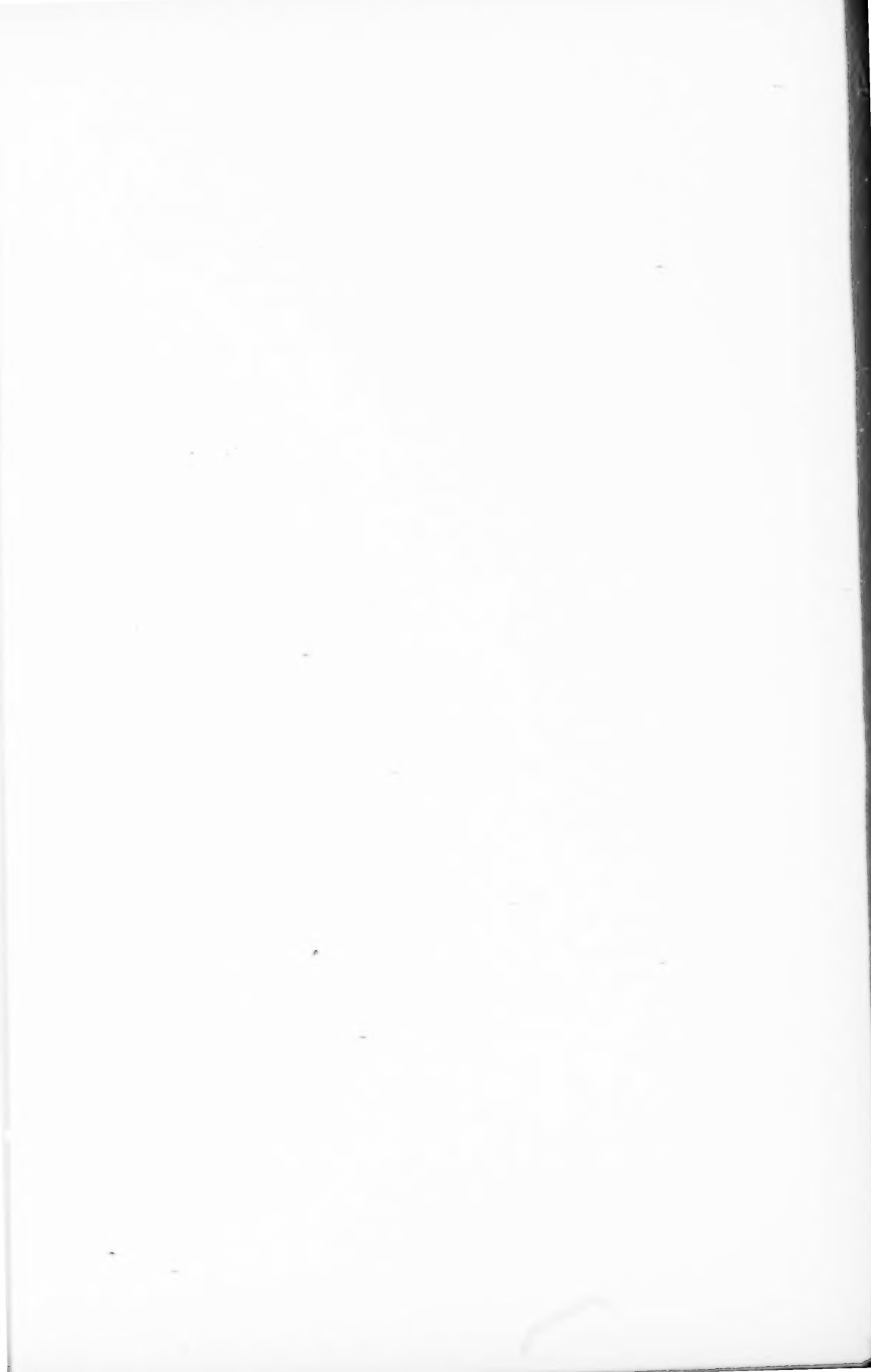
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KATHERINE JONES McCLELLAND, *et al.*,
ROGER ADAMS, *et al.*, and
PHILLIP CHEEK, *et al.*,

v.

WILLIE B. KILGORE, DORIS
McCONNELL and PATSY BURCHETT,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petitioner, the Commonwealth of Virginia, respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons.

REFERENCE TO OPINIONS

The opinions and orders of the United States District Court for the Western District of Virginia, Big Stone Gap Division, are reported at 637 F.Supp. 1241 (W.D.Va. 1985); 637 F.Supp. 1249 (W.D.Va. 1985); and 637 F.Supp. 1253 (W.D.Va. 1986), and are set forth in Appendix C, page A-27.

The opinion of the United States Court of Appeals for the Fourth Circuit affirming in part and reversing in part the district court's judgment is reported at 829 F.2d 1319 (1987) and is set forth in Appendix A, page A-1. The order denying plaintiffs/appellees' petition for rehearing and suggestion for rehearing en banc, filed November 19, 1987, is set forth in Appendix B, page A-25.

JURISDICTION

The order of the court of appeals denying plaintiffs'/appellees' petition for rehearing and suggestion for rehearing en banc was entered on November 19, 1987. (A-25). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions and the state statutes at issue here are reproduced as Appendix D at page A-70 of the appendix to the petition.

STATEMENT OF THE CASE

Virginia law provides that County General Registrars shall be appointed by the local county electoral board to serve a four year term of office. Va. Code § 24.1-43. (A-74). Virginia law also requires that the county electoral board shall consist of three members, a majority of whom "shall be from the political party which casts the highest number of votes in the Commonwealth for governor at the last preceding gubernatorial election." Va. Code § 24.1-29. (A-70).

Doris McConnell and Willie Kilgore, both Republicans, were the general registrars respectively of Lee County and Scott County, in Virginia. Both were appointed in 1979 by majority Republican local electoral boards.

In January, 1982, Charles S. Robb, a Democrat, replaced Republican John S. Dalton as Governor of Virginia. With that change, the political composition of the local electoral boards changed because, as required by statute, the majority Republican boards were replaced by majority Democratic boards.

McConnell and Kilgore's terms were set to expire on March 31, 1983, but on March 1, 1983, the outgoing Lee and Scott County Republican boards conducted hastily convened meetings in which they purported to reappoint McConnell and Kilgore to another four year term. Within a week, however, the newly constituted Democratic electoral boards met, and appointed Phillip Cheek and Glenda Duncan, both Democrats, as the new Lee and Scott County general registrars. All of these appointments were certified to the State Board of Elections, and the Secretary of the State Board sought state court declaratory review for

a determination as to which appointees properly held office. State Circuit Judge Robert Stump ultimately held that the outgoing Republican boards were without authority to reappoint the registrars, and confirmed that Democrats Cheek and Duncan were the new duly appointed general registrars of Lee County and Scott County, Virginia.

McConnell and Kilgore then filed suits under 42 U.S.C. § 1983 in the United States District Court for the Western District of Virginia against the new Democratic members of their local electoral boards, claiming that the refusal to reappoint them violated their First Amendment political speech and association rights as articulated by this Court in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 57 (1980) (hereafter “*Elrod/Branti* rule”). In addition, Patsy Burchett, a Lee County Assistant Registrar working for McConnell, was discharged by the newly appointed Cheek. She filed an identical suit against Cheek and Lee County.

From the outset, a dispute existed as to whether the defendant local elections officials were employees of the state, or of their localities, for purposes of insurance coverage and legal representation. Lee County and its insurer assumed coverage and provided legal representation from the start for the Lee County defendants, but Scott County denied coverage and refused representation.

The Scott County defendants then brought a federal court declaratory judgment action against Scott County’s insurer, Republic Insurance, for a ruling on whether Republic’s policy provided coverage for the Scott County elections officials.

All of these cases were then assigned to District Judge Jackson Kiser, who conducted jury trials in the summer

of 1985 in the *McConnell*, *Kilgore* and *Burchett* matters. The jury in each case was instructed to return a special verdict on the question of "whether defendants refused to reappoint plaintiff solely because of her political affiliation," and to fix damages, if any.

The jury found for the plaintiff in each case, and assessed damages at roughly \$70,000 each for McDonnell and Kilgore and \$40,000 for Burchett. Post-trial motions were filed asserting, among other things, that political affiliation was an appropriate requirement for the position of general registrar, that the failure to reappoint plaintiffs was not equivalent to a discharge, and that the defendants were entitled to qualified immunity from personal liability for money damages. The Commonwealth of Virginia appeared and argued as amicus on the post-trial motions. Judge Kiser rejected these motions, ordered the plaintiffs reinstated, and upheld the juries' verdicts for damages in an opinion issued in December, 1985. (A-27). He reserved for further briefing, however, the question of insurance coverage, suggesting that the resolution of this issue was dependent upon whether the defendant board members/general registrars were state or local employees. At this time, the Commonwealth of Virginia intervened in the litigation as a party defendant, filed briefs and orally argued that these officials were local employees as a matter of state law, and were covered in their individual and official capacities under the localities' insurance policies. The counties of Lee and Scott appeared and contended that the defendants were state employees, while the plaintiffs argued that the defendants were in a "hybrid" category, and should be considered employees of both the state and the localities. Judge Kiser adopted

the counties' arguments and in an opinion issued on April 28, 1986, (A-51), declared the individual defendants to be state employees, and ordered the Commonwealth's carrier, Compass Insurance, to pay the judgments. The Commonwealth and the individual defendants timely appealed to the Fourth Circuit.

On appeal, appellants again asserted that political affiliation must be considered an appropriate requirement for the position of general registrar. In Virginia, the general registrar is the *sole employee* chosen by the board. Appellants argued that any political animosity or antipathy would create an untenable work situation between the general registrar and local electoral board with the result that the interrelationship and functioning of these offices would be thwarted. For this reason, appellants argued, the Virginia legislature adopted a statutory scheme for the appointment of general registrars which permits local boards, as a matter of state law, to consider party affiliation as a criterion for the position. The appeals court rejected these contentions, finding that the state legislative appointment scheme did not *mandate* partisan appointments and in any event, that the possibility of political antipathy in a small office was no longer regarded as a legitimate exception to the *Elrod/Branti* rule.

Appellants also argued that the district court erred in holding the defendants to be state employees, where the overwhelming weight of state statutes, administrative decisions, and state and federal judicial authority made clear that these local elections officials were considered employees of the *localities* in which they served. The court of appeals did not follow these state law mandates, however, and

instead adopted its own, novel, "nexus to the governmental entity" formula to find that the defendants were employees of the state.

Finally, the court of appeals reversed the district court's award of damages to the plaintiffs, holding that the law relating to political discharges was not "clearly established" at the time of the employment actions in this case. This finding is consistent with the holdings of other circuit courts of appeal that the law in this area has not yet been clearly defined. *Hartley v. Fine*, 780 F.2d 1383 (8th Cir. 1985); *De Abadia v. Mora*, 792 F.2d 1187 (1st Cir. 1986). Accordingly, because the defendants were entitled to qualified-immunity in their individual capacities, and were protected by Eleventh Amendment immunity in their official capacities as state employees, they could not be held liable for damages.

The appellees' Petition for Rehearing In Banc, seeking reconsideration of the damages issues, was denied by a panel of the court of appeals on November 19, 1987. (A-25).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' REFUSAL TO CONSIDER WHETHER POLITICAL ANIMOSITY MAY JUSTIFY A PATRONAGE RELATED DISCHARGE FROM GOVERNMENT EMPLOYMENT IGNORES THE DEVELOPING LAW AND CREATES INCONSISTENCY AMONG THE CIRCUITS ON THIS ISSUE.

Petitioner submits that the court of appeals erred in failing to give any deference whatsoever to petitioner's argument in this case that political considerations play a necessary role in the employment of general registrars in Southwest Virginia. The facts in this case establish that the elections mechanism in Virginia relies upon a mutual interdependence of function between the local registrar and the local board, and this working relationship involves a significant level of trust and cooperation. The board and the registrar, for example, must collaborate in determining the number and location of registration offices, and the need for additional registration days. Va. Code § 24.1-49. (A-82). The board and the registrar must work together to provide absentee voting in the district. Va. Code § 24.1-228.1, 229 (A-90, 93). The registrar must determine the qualifications of the officers of election whom the board appoints for the locality. Va. Code § 24-1-105, 106. (A-87, 88). The board and the registrar must cooperate in determining the number of voting machines to be based in each precinct. Va. Code § 24.1-203. (A-88). Further, the registrar is the principal contact, or spokesperson for the board members. The registrar is responsible for preparing and submitting the budget for funding registrations activities, and he or she must maintain the

records of the board available for public inspection. Va. Code § 24.1-30. (A-72).

It is significant that there is only *one* general registrar in each locality, and thus only one person upon whom the board can rely in implementing the board's elections policies and procedures. Their relationship requires a working environment free of acrimony, whether political, or personal arising out of political differences. Any interference with this relationship clearly could thwart the proper functioning of these offices. *See, e.g., Ness v. Marshall*, 660 F.2d 517, 521 (3d. Cir. 1981) ("Plaintiffs were in a position to thwart the goals of the new administration in numerous ways").

In this case, there was ample evidence of political antipathy and acrimony between the Republican registrars and the newly appointed Democratic boards. Indeed, inter-party conflict has been part of the history of southwest Virginia's "Fightin' Ninth" district since at least 1794. *See Trigg v. Preston*, 1 Hinds' Precedents 985 (3d. Cong. 1974); *Ramey v. Harber*, 589 F.2d 753, 755 (4th Cir. 1978) ("Lee County has a history of spirited partisan political battles. . ."). Here, the record establishes that the outgoing Republican board members in both Lee and Scott Counties attempted to *circumvent* the appointing authority of the new boards by staging an eleventh hour, purported "reappointment" of the former registrars, and the new Democratic board members were deliberately excluded from the boards' meetings. This action was insubordinate, confrontational, illegal, and clearly raised questions regarding the plaintiffs' willingness to work in a cooperative spirit with the new board members.

Other courts of appeal have recognized that political acrimony can interfere with the cooperation and rapport necessary to permit people to work together in a small office or close environment. As the Seventh Circuit noted in *Meeks v. Grimes*, 779 F.2d 417 (7th Cir. 1985):

Political animosity, while not a noble basis for discharging an employee, can in practice create a hostile work environment where face to face contact and cooperation become impossible.

Meeks, Id., 779 F.2d at 423. See also *Soderbeck v. Burnett Co.*, 752 F.2d 285, 288 (7th Cir. 1985) ("You cannot run a government with officials who are forced to keep political enemies as their confidential employees"). At least two other courts of appeal have given more deference than the Fourth Circuit to whether an employee worked in a policy-making or confidential position, or served in a spokesperson capacity. *Fuentes v. Gaztambide*, 803 F.2d 1, 5 (1st Cir. 1986); *Brown v Trench*, 787 F.2d 167, 168 (3d Cir. 1986). In this case, the Virginia General Assembly has *legislatively* determined that political feuding and inter-party conflict can adversely affect the state's vital interest in the efficiency and effectiveness of the local elections process. Accordingly, it established an appointment mechanism facilitating the consideration of party affiliation as an appropriate criterion for the office of general registrar.

In light of the above, Petitioner submits that the Fourth Circuit's rigid application of the *Elrod/Branti* rule in this case should not be permitted to stand. The court ignores the potentially destructive impact that political antipathy can have on the operations of a small government office, and improperly disregards the Virginia legislature's determination that political affiliation is an

appropriate if not necessary criterion for the position of general registrar.

II. THE COURT OF APPEALS' HOLDING IN THIS CASE THAT LOCAL ELECTIONS OFFICIALS ARE STATE EMPLOYEES HAS CREATED A NOVEL AND UNSUPPORTED EXCEPTION TO STATE LAW, AND IS DISRUPTING WELL SETTLED STATE/LOCAL GOVERNMENT RELATIONSHIPS.

It is clear that the court of appeals erred in ignoring the substantial constitutional, legislative, administrative and judicial law and history holding local electoral board members and registrars to be employees of their locality. See, e.g., *Hardy v. Board of Supervisors of Dinwiddie County*, 387 F.Supp. 1252, 1255 (E.D.Va. 1975) (holding that the members of the Electoral Board of Dinwiddie County, Virginia "are, without doubt, local officials and not officers of the State.'). From 1957 to 1983, the Attorney General of Virginia has held in no less than eight officials opinions that these officials are employees of the localities.¹ The General Assembly of Virginia has affirm-

¹See Report of the Attorney General of 1957-58 at 111 (member of electoral board must reside within locality); Report of the Attorney General of 1958-59 at 236 (member of electoral board is an officer of the county and may not enter into contract with county); Report of the Attorney General of 1968-69 at 54 (member of electoral board is county official); Report of the Attorney General of 1970-71 at 162 (general registrar is local official; electoral board member is local official); Report of Attorney General of 1972-73 at 325 (general registrar is an employee of municipality); Report of the Attorney General of 1981-82 at 301 (members of the electoral board of a city are city officers); Report of the Attorney General of 1982-83 at 225 (successive attorney generals over a period of years have held local elections officials to be employees of the county or city involved); Report of the Attorney General of 1983-84 at 300 (general registrar is city employee for purposes of accrual of employment benefits).

actively acted to make explicit what has previously been tacit approval of the holdings of these numerous attorney general opinions. In 1986, *Virginia Code* § 24.1-32, (A-73), which formerly provided that elections officials were deemed "local employees" for workers' compensation purposes, was amended to state that "[m]embers of electoral boards, officers of election, general registrars and assistant registrars shall be deemed, for all purposes . . . to be employees of the respective cities or counties in which they serve." When the legislature amends a statute in response to a controversy such as this litigation, Virginia law holds that it must be considered a legislative interpretation of the original statute. *Boyd v. Commonwealth*, 216 Va. 16, 21, 229 S.E.2d 889 (1975). Thus, the unequivocal legislative declaration in this case is that these officials are employees of the counties.

The court of appeals completely ignored this substantial body of Virginia law and articulated its own "nexus to the sovereign" approach to decide that these local elections officials were state employees. This test created by the Fourth Circuit requires a court to "determine whether the policies, responsibilities, and concerns of the officer bear a closer nexus to the state than to a local government entity" (A-17). The court's approach, however, is flawed in a number of respects. First, this approach has been rejected by other courts of appeal. See *Crane v. State of Texas*, 759 F.2d 412 (5th Cir. 1985) (reversing trial court's holding that a district attorney was a state employee because he was acting pursuant to state policy). Second, the court of appeals relied on a nineteenth century Virginia Supreme Court case, *Burch v. Hardwicke*, 71 Va. (Gratt.) 24 (1878), which held that a

city police chief was a "state official" who could not be removed by the mayor. The *Burch* case, however, has been limited by statute. See, e.g. *Smith v. Bryan*, 100 Va. 199, 40 S.E. 652 (1902) (upholding power of Mayor of City of Roanoke to remove Chief of Police). The case at bar likewise is controlled by statute, and to the extent that *Burch* still may be considered good law, it simply has no application here.

It should also be noted that the court of appeals' "test" is having an adverse impact on other Virginia law, and it is now being asserted as authority for an argument that virtually every local official is a state employee. Local school board officials are now being asserted in litigation as state employees, because, the argument goes, the "responsibilities and concerns" of education bear a closer nexus to the state than to the local government entity. See, *Darius Irby, et al. v. Susan H. Fitz-Hugh, et al.*, C.A. No. 87-0366-R (ED. Va., filed Oct. 9, 1987). Local welfare department employees, it is claimed, should be subject to suit as state officials under the Virginia Tort Claims Act, Va. Code § 8.01-195.1 et seq., because welfare funding and regulations are provided and promulgated by the state. Indeed, if the court of appeals' test is literally applied, local welfare officials should be deemed employees of the federal government, since it is federal regulations and federal funding which direct how welfare programs are to be administered. The flaw in the court of appeals' approach is that it is *too* flexible. It is creating a serious dilemma for state-local relations in the Commonwealth of Virginia.

Petitioner recognizes that this Court has expressed reluctance to review court of appeals decisions alleged

to be in error due to an incorrect interpretation of state statutes or rules of decision except in "exceptional cases." *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). This is such a case. Moreover, this is a case where the federal courts need not speculate as to the meaning of state law, because an authoritative construction of the applicable state law may be obtained through certification of the question to the Virginia Supreme Court, pursuant to Rule 5:42 of the Rules of the Supreme Court of Virginia.² This procedure was employed most recently by this Court in *Virginia v. American Booksellers Association, Inc.*, No. 86-1034 (decided Jan. 25, 1988), 56 U.S.L.W. 4113 (Jan. 26, 1988), and is appropriate for utilization in the case at bar to obtain a conclusive resolution of this purely state law question. Accordingly, petitioner requests this Court to vacate the order of the court of appeals and remand the matter back to that court with instructions to certify the state/local employment question to the Virginia Supreme Court.

—o—

²Rule 5:42 became effective on April 1, 1987, well after this case was argued and submitted to the court of appeals for decision.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

COMMONWEALTH OF
VIRGINIA, etc.

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APPENDIX A

Doris McCONNELL, Plaintiff-Appellee,
and
Willie B. Kilgore, Plaintiff,
v.

Roger ADAMS, Evelyn Bacon,
Defendant-Appellant.

Scott County, VA., Amicus Curiae,
and

Susan H. Fitz-Hugh; Katherine Jones McClelland; Faye Owens; Charles Herman Stallard; Glenda Clark Duncan; Judy Carroll; Phillip Lee Cheek; Lee County, Virginia, Defendant.

Doris McCONNELL, Plaintiff-Appellee,
and

Willie B. Kilgore, Plaintiff,
v.

Roger Adams; Evelyn Bacon,
Defendant-Appellant.

Scott County, VA., Amicus Curiae,
and

Susan H. Fitz-Hugh; Katherine Jones McClelland; Faye Owens, Charles Herman Stallard; Glenda Clark Duncan; Judy Carroll; Phillip Lee Cheek; Lee County, Virginia; Commonwealth of Virginia, ex rel. State Board of Elections, Defendant.

Willie B. KILGORE, Doris McConnell,
Plaintiff-Appellee,

v.

Katherine Jones McCLELLAND;
Faye Owens, Defendant-Appellant,

Scott County, VA., Amicus Curiae,

and

Roger Adams; Evelyn Bacon; Susan H. Fitz-Hugh;
Charles Herman Stallard; Glenda Clark Duncan; Judy
Carroll; Phillip Lee Cheek; Lee County, Virginia; Com-
monwealth of Virginia, ex rel. State Board of Elections,
Defendant.

Katherine Jones McCLELLAND; Faye Owens,
Plaintiff-Appellee,

v.

COMPASS INSURANCE COMPANY,
Defendant-Appellant

and

Republic Insurance Company; Commonwealth of Virginia,
ex rel. State Board of Elections, Defendant.

Willie B. KILGORE; Doris McConnell; Patsy Burchett;
Katherine Jones McClelland; Faye Owens, Plaintiff-
Appellee,

v.

COMMONWEALTH OF VIRGINIA, ex rel. STATE
BOARD OF ELECTIONS,
Defendant-Appellant.

Katherine Jones McCLELLAND; Faye Owens,

Plaintiff-Appellant,

v.

REPUBLIC INSURANCE COMPANY; Compass Insur-
and Company Commonwealth of Virginia, State Board
of Elections, Defendant-Appellee.

Doris McCONNELL,
Plaintiff-Appellee,

and

Willie B. Kilgore, Plaintiff,

v.

COMPASS INSURANCE COMPANY,

Party in Interest-Appellant,

Scott County, VA., Amicus Curiae,

and

Roger Adams; Evelyn Bacon; Susan H. Fitz-Hugh; Katherine Jones McClelland; Faye Owens; Charles Herman Stallard; Glenda Clark Duncan; Judy Carroll; Philip Lee Check; Lee County, Virginia; Commonwealth of Virginia, ex rel. State Board of Elections, Defendant.

Willie B. KILGORE, Plaintiff-Appellee,

and

Doris McConnell, Plaintiff,

v.

COMPASS INSURANCE COMPANY,

Party in Interest-Appellant,

Scott County, VA., Amicus Curiae,

and

Roger Adams; Evelyn Bacon; Susan H. Fitz-Hugh; Katherine Jones McClelland; Faye Owens; Charles Herman Stallard; Glenda Clark Duncan; Judy Carroll; Philip Lee Check; Lee County, Virginia; Commonwealth of Virginia, ex rel. State Board of Elections, Defendant.

Willie B. KILGORE; Doris McConnell; Patsy Burchett, Plaintiff-Appellant,

v.

Roger ADAMS; Evelyn Bacon; Katherine Jones McClelland; Faye Owens; Charles Herman Stallard; Phillip Lee Check; Lee County, Virginia; Commonwealth of Virginia, ex rel. State Board of Elections; Republic Insurance Company; Compass Insurance Company, Defendant-Appellee,

Scott County, VA., Amicus Curiae,

and

Susan H. Fitz-Hugh; Glenda Clark Duncan; Judy Carroll,
Defendant.

Patsy BURCHETT, Plaintiff-Appellee,

v.

Phillip Lee CHEEK,
Defendant-Appellant,

and

Susan H. Fitz-Hugh; Lee County, Virginia, Defendant
(Two Cases).

Patsy BURCHETT, Plaintiff-Appellee,

v.

COMPASS INSURANCE COMPANY,
Party in Interest-Appellant,

and

Susan H. Fitz-Hugh; Phillip Lee Cheek; Lee County,
Virginia, Defendant.

Nos. 86-1507, 86-1604, 86-1606 to 86-1611, 86-1619, 86-1620
and 86-3011.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 2, 1987.

Decided Oct. 1, 1987.

Gregory E. Lucyk, Asst. Atty. Gen., Deborah Wood
Brattain (Gary C. Hancock, Thomas J. McCarthy, Gilmer,
Sadler, Ingram, Sutherland and Hutton on brief), Larry
B. Kirksey (Woodward, Miles & Flanagan, P.C. on brief),
James Jones (Penn, Stuart, Eskridge & Jones, Mary Sue
Terry, Atty. Gen. of Va., Gail Starling Marshall, Deputy
Atty. Gen. Henry-Keuling-Stout, Florence Powell, Mul-

lins, Keuling-Stout, Thomason & Harris, C. Dean Foster, Jr., Co. Atty., on brief), for defendants-appellants:

William Henry Hurd (Bryant, Hurd & Porter, on brief). Cynthia D. Kinser (Joseph E. Wolfe, Jerry W. Kilgore, Terry G. Kilgore, Wolfe & Farmer, on brief), for plaintiffs-appellees.

Before RUSSELL and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

This consolidated appeal concerns judgments for damages and injunctive relief entered against county electoral board members and a general county registrar. These appellants failed to reappoint two registrars and an assistant registrar, appellee, due to their political affiliations. This appeal also concerns the district court's order that the Commonwealth of Virginia's insurance carrier pay the judgments. We affirm the district court's judgment that the failure to reappoint the appellees violated their constitutional rights and its order requiring the appellants to reappoint the appellees to their respective positions. Because the appellants are not subject to damages in either their individual or official capacities, we reverse the judgments for damages.¹

I

Until April 1, 1983, Willie Kilgore and Doris McConnell served as general registrars for Scott and Lee Counties in Virginia, respectively. Both were Republicans. In the 1982 general elections, Virginia voters replaced the

1. The district court opinions are reported as *Kilgore v. McClelland*, 637 F.Supp. 1241 (W.D.Va.1985); *Burchett v. Cheek*, 637 F.Supp. 1249 (W.D.Va.1985); *Kilgore v. McClelland*, 637 F.Supp. 1253 (W.D.Va.1986).

incumbent Republican governor with a Democrat. Because of this change, Va. Code Ann. § 24.1-29 (1985) required a Democratic majority on the three-member electoral board in each city and county. The terms of the Democratic-controlled boards commenced on March 1, 1983.

When the terms of Kilgore and McConnell expired on March 31, 1983, their respective electoral boards did not reappoint them as general registrars. Instead, the Scott County Board appointed Glenda Duncan, and the Lee County board appointed Philip Cheek. Both were Democrats. Kilgore and McConnell then filed suit under 42 U.S.C. § 1983 against the Democratic members of their respective electoral boards, alleging that they were not reappointed solely because they were Republicans. They sought reappointment and damages against the board members in both their individual and official capacities. Their claims were severed and tried to different juries, which returned verdicts against the board members in excess of \$75,000 in each case. The district court sustained the verdicts and ordered the board members to reinstate Kilgore and McConnell. Finding that the board members were state employees, the district court ordered the state's insurance carrier to pay the judgments.

Patsy Burchett served as assistant general registrar to Doris McConnell in Lee County prior to April 1, 1983. When Cheek became general registrar in March 1983, he declined to reappoint Burchett as his assistant. Burchett filed a § 1983 action against Cheek, alleging that she was not reappointed solely because she was a Republican. She sought reappointment and damages against Cheek in both his individual and official capacities. The jury returned a verdict in favor of Burchett and awarded her \$40,000 in damages. The district court sustained the ver-

diet and ordered reinstatement of Burchett. Finding that Cheek was a state employee, the district court ordered the state's insurance carrier to pay the judgment.²

II

In *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed. 2d 547 (1976), the Supreme Court forbade the discharge or threatened discharge of a "nonpolicymaking, nonconfidential government employee" upon the sole ground of the employee's political affiliation. In *Branti v. Finkel*, 445 U.S. 507, 518, 100 S.Ct. 1287, 1295, 63 L.Ed.2d 574 (1980), the Court refined the standard applicable to politically motivated charges:

It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. . . . In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position, rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti establishes that a public official may not be discharged solely for reasons of patronage unless the employer can demonstrate that party affiliation is necessary for effective job performance.

The verdicts finding that the registrars were not rehired for reasons of patronage are amply supported by the record. Nevertheless, the appellants contend that

2. Damages in all cases were based on the aggregate salary of a registrar or assistant over a four-year period. The judgments, however, provided for reduction of the damages by future earnings resulting from reinstatement. McConnell and Burchett resumed their offices in 1986 and Kilgore in 1987.

Branti does not protect a public employee who is not reappointed at the expiration of an employment term.³ They note that no decision in this circuit has applied *Branti* to a failure to rehire. The appellants alternatively contend that the Virginia statutory scheme governing election officials provides a justification for their actions that satisfies the *Branti* standard.

We thus face two questions: first, does the *Branti* prohibition on patronage dismissals govern a failure to reappoint? And second, if so, have the appellants demonstrated sufficient justification for their decisions not to reappoint the registrars?

We rely on the language of *Branti* and the weight of post-*Branti* authority in deciding that *Branti* indeed governs patronage refusals to rehire as well as patronage discharges. Certainly, the appellees had no contractual right or contractually-based expectations of reemployment. It does not follow, however, that the refusal to reemploy them did not violate their constitutional rights. The Supreme Court has consistently recognized that “even though a person has no ‘right’ to a valuable governmental benefit . . . [government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.”

3. The appellants argue that the appellees’ terms of employment had ended and that the appellees therefore had a duty to apply for continued employment. The appellants also argue that since Kilgore and McConnell did not formally reapply, their cases should be treated as failure to hire cases rather than failure to rehire cases. We need not, however, address the application of *Branti* to failure to hire cases, since the record indicates that the appellants in both *Kilgore* and *McConnell* had notice of the appellees’ intent to continue serving as registrars. The district court properly treated these cases as failure to rehire cases.

Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). *Perry* reaffirmed prior Supreme Court decisions holding that non-renewal of a nontenured public school teacher's contract cannot be based on the teacher's exercise of first amendment rights. 408 U.S. at 596-98, 92 S.Ct. at 2697-98. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

Branti cited *Perry*, *Keyishian*, and *Shelton* in delineating its standard for politically motivated discharges. *Branti*, 445 U.S. at 514-16, 100 S.Ct. at 1292-93. *Branti* also strongly suggests in a footnote that one cannot draw any constitutional line between a failure to reappoint and a discharge. The employer's in *Branti* urged the Court to treat the case as a failure to reappoint case rather than a dismissal, arguing that the employees' terms automatically expired along with the employing official's term and that the employees had no reasonable expectation of reemployment by an opposition party. The Court rejected this distinction, noting that "it is clear that the lack of a reasonable expectation of continued employment is not sufficient to justify a dismissal based solely on an employee's private political beliefs." 445 U.S. at 512 n. 6, 100 S.Ct. at 1291 n. 6.

Courts have treated failure to rehire as the equivalent of dismissal in applying *Branti* to patronage employment practices. See, e.g., *Cheveras Pacheco v. Rivera Gonzalez*, 809 F.2d 125, 127-28 (1st Cir.1987); *Furlong v. Gudknecht*, 808 F.2d 233, 237-38 (3d Cir.1986), *McBee v. Jim Hogg County*, 730 F.2d 1009, 1015 (5th Cir. 1984); *Cox v. Thomp-*

son, 635 F.Supp. 594, 597-98 (S.D.Ill.1986); *Whited v. Fields*, 581 F.Supp. 1444, 1457 (W.D.Va.1984); *Soileau v. Zerangue*, 553 F.Supp. 845, 848 (W.D.La. 1982); *Visser v. Magnarelli*, 530 F.Supp. 1165, 1168 (N.D.N.Y. 1982); *Brady v. Paterson*, 515 F.Supp. 695, 698-99 (N.D.N.Y. 1981.) We too conclude that there is no constitutional difference between a patronage refusal to rehire and a patronage dismissal. The district court correctly applied *Branti* to the appellants' refusal to rehire the appellees.

Nevertheless, a court must sustain a patronage refusal to rehire when the employer "can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518, 100 S.Ct. at 1295. The appellants emphasize that the Virginia General Assembly created a statutory scheme requiring political patronage in the composition of electoral boards, which in turn fosters patronage in the appointment of registrars. The appellants argue that the General Assembly has thus determined that political party affiliation is an appropriate requirement for the effective job performance of a registrar or assistant registrar.

Although the Virginia statutes require certain political party affiliation for members of electoral boards, the statutes do not require that registrars be members of the majority political party. Furthermore, when asked whether political party affiliation would either enhance or detract from a registrar's job performance, the Secretary of the State Board of Elections answered in the negative. The Secretary also testified that she had no idea of the party affiliation of most of the registrars. The district

court correctly found that party affiliation is unnecessary to perform a registrar's ministerial duties effectively. While the Virginia statutory scheme may facilitate political patronage in the appointment of registrars, this alone does not satisfy the *Branti* standard. Party affiliation must be more than a matter of convenience, it must be an appropriate requirement for the position. Because the appellants have not demonstrated any such requirement, we affirm the judgment of the district court that the failure to rehire the appellees violated their first and fourteenth amendment rights.

III

The Supreme Court held in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), that public officials who violate the constitutional rights of others enjoy qualified immunity from liability for damages when their conduct satisfies the standard of "objective reasonableness":

[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

. . . [T]he judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Clearly *Harlow* and its progeny do not require public officials to anticipate the extension of legal principles or the clarification of constitutional rights. *Mitchell v. Forsyth*, 472 U.S. 511, 534-35, 105 S.Ct. 2806, 2820, 86 L.Ed.2d 411 (1985). Equally clearly, however, public officers should not automatically receive qualified immunity simply because there is not a strict factual nexus between their actions and the precedent establishing the right allegedly violated. 472 U.S. at 585 n. 12, 105 S.Ct. at 2820 n. 12. Public officials must consider the possible relevance of legal principles established in analogous factual contexts. However, in cases where there is a legitimate question whether those principles extend to the particular case before the court or whether the particular case might constitute an exception to those principles, the court should sustain a qualified immunity defense.

In rejecting the appellants' qualified immunity defense, the district court held that the appellees' constitutional rights "were clearly established and had been for several years." *Kilgore*, 637 F.Supp. at 1247. Clearly a reasonable public official should have known that *Branti* established a rule protecting public employees from discharge solely for patronage reasons unless party affiliation is a relevant job requirement. The question we must resolve is whether the appellants' actions came under any arguable or established exception to *Branti*.

The appellants contend that an open question existed whether their actions fell within an exception to *Branti* based on the "small office" concerns noted at *dictum* in *Ramey v. Harbor*, 589 F.2d 758, 756-57 (4th Cir. 1978):

[W]e take note of the intimate relationship that undoubtedly exists between the sheriff and his deputies

in a small county like Lee County, Virginia. The efficient operation of the sheriff's office in Lee County requires a high degree of mutual cooperation, confidence and support. None of these elements is likely to be present where the parties are bitter political antagonists. By contrast, the relationship between the sheriff and his deputies in the large Cook County, Illinois office [the office involved in *Elrod*] is likely to be far more impersonal. . . . While [the deputies'] lack of party support could create some antipathy between them and the newly elected Democratic sheriff of Cook County, the existence of such antagonism is far from inevitable.

Ramey noted that these factual distinctions between large and small office situations "raise[d] a question as to the applicability of *Elrod*." 589 F.2d at 757. Concurring, Judge Hall emphasized that the small size of the office was one of the factors that made *Elrod* inapplicable. 589 F.2d at 761.

The acts of the appellants occurred during 1983. Roughly contemporaneous with these acts, other courts embraced the rationale of the *Ramey* dictum and recognized a small office exception to *Elrod/Branti*. See *McBee v. Jim Hogg County*, 703 F.2d 834, 841-42 (6th Cir.1983); *Horton v. Taylor*, 585 F.Supp. 224, 227-28 (W.D.Ark.1984); *Dove v. Fletcher*, 574 F.Supp. 600, 604-05 (W.D.La.1983). Though the small office exception recognized in these cases has subsequently been called into doubt, and notwithstanding that this circuit never formally adopted such an exception, these cases indicate that there was indeed a legitimate question at the time the appellants acted whether

there existed a "small office" exception to *Branti*.⁴ A reasonable public official in the appellants' position could have concluded that the appellants' acts would not violate the appellees' constitutional rights. Therefore, the appellants are entitled to qualified immunity against damages in their individual capacities.

IV

The district court also assessed damages against the appellants in their official capacities. Whether this judgment may be sustained depends on the appellants' status as state or local employees. Virginia and its insurance carrier argue that general registrars and electoral board members are local employees for whose actions the state is not responsible. The counties and their carriers protest that the appellants are state—not local—employees.

In looking to the applicable Virginia statutes, we find no dispositive statements concerning the status of these officials.⁵ Thus, we turn for guidance to Virginia deci-

4. This circuit expressly rejected the notion of any "small office" exception in *Jones v. Dodson*, 727 F.2d 1329, 1338 and n. 14 (4th Cir.1984). *Jones*, however, was not decided until well after the appellants' acts.

Likewise, subsequent proceeding in *McBee*, *Horton*, and *Dove* either rejected or cast doubt upon the small office exception. *McBee v. Jim Hogg County*, 730 F.2d 1009 (5th Cir.1984) (en banc); *Horton v. Taylor*, 767 F.2d 471 (8th Cir.1985); *Dove v. Fletcher*, 744 F.2d 92 (5th Cir.1984). Like *Jones*, these cases were not decided until after the appellants' acts.

5. The former Va.Code Ann. § 24.1-32 (1985) provided that registrars and electoral board members were local officials for the purposes of the Workers' Compensation Act but did not speak to their status for other purposes. The state argues

sional law and the general statutory scheme governing registrars and electoral boards.

No Virginia case has conclusively determined the status of these election officials. Indeed, the cases do not provide any hard and fast rules for determining the status of public employees in general. As the state Attorney General noted in an opinion arising out of these proceedings:

There is no firm rule expressed in the cases by which one may, with confidence, determine in every situation that a particular public officer or employee is a State or local government official, and, in fact, each such determination tends to be controlled by the context in which the question is presented.

1982-83 Report of the Attorney General, at 225. Virginia courts have even held such typically "local" officials as city council members and police to be state rather than

(Continued from previous page)

that this case is governed by the 1986 amendment to § 24.1-32, which reads in pertinent part:

Members of electoral boards, officers of election, general registrars, and assistant registrars shall be deemed, for all purposes, except as otherwise specifically provided by state law and including rules and regulations of the State Board of Elections, to be employees of the respective cities or counties in which they serve.

The state argues that this amendment constitutes a legislative interpretation of the prior statute and that accordingly we must find the appellants to be local employees.

We interpret § 24.1-32 to mean that election officials are local employees unless statutes or administrative regulations determine them to be state employees. That is, of course, the question we must resolve here. Further, we note that the amendment to § 24.1-32 was not effective until July 1, 1986, long after the institution and trial of these actions. See Va.Code Ann. § 1-12(A) (1987).

local officials, depending on the context in which the issue arises. *Lambert v. Barrett*, 115 Va. 136, 140-43, 78 S.E. 586, 587-88 (1913) (city council members); *Burch v. Hardwicke*, 71 Va. (30 Gratt.) 24, 35-36 (1878) (police chief).

The *Burch* case provides general guidance for distinguishing state and local officers in Virginia. *Burch* addressed the question whether the mayor of Lynchburg could discharge the chief of police who, pursuant to the city charter, was appointed and subject to removal by the police commission. Noting that the mayor had constitutional authority to remove a city official, but not a state official, the court turned its attention to determining the status of the police chief:

Who, then, are the "city officers," in the true and literal sense of the term? It is not easy to define them in all cases; but there are many such provided for in the charter of the city of Lynchburg, and in the charters of other cities. Among these are, perhaps, city engineers and surveyors, officers having superintendence and control of streets, parks, waterworks, gas-works, hospitals, sewers, cemeteries, city inspectors, and no doubt many others well known in large cities. Their duties and functions relate exclusively to the local affairs of the city, and the city alone is interested in their conduct and administration.

On the other hand, there are many officers, such as city judge, sergeant, clerk, commonwealth's attorney, treasurer, sheriff, high constable, and the like, some of whom are recognized by the constitution, while others are not. All these are generally mentioned as city officers, and they are even so designated in the constitution; but no one has ever contended that either of them is in any manner subject to the control and removal of the mayor. The reason is, that while they are elected or appointed for the city, and while their jurisdiction is confined to the local limits, their duties

and functions, in a measure, concern the whole state. They are state agencies or instrumentalities operating to some extent through the medium of city charters in the preservation of the public peace and good government. However elected or appointed, however paid, they are as much state officers as constables, justices of the peace and commonwealth's attorneys, whose jurisdiction is confined to particular counties.

71 Va. at 33-34. The court held that the chief of police was a state official whom the mayor could not remove. 71 Va. at 35-36, 41. The Virginia court subsequently cited *Burch* in *City of Alexandria v. McClary*, 167 Va. 199, 203, 188 S.E. 158, 160 (1936), in finding that a police officer was a state official. More recently, in *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984), the court observed that "[a] state employee has a closer nexus to the sovereign." 228 Va. at 312, 321 S.E.2d at 663. This sentence neatly summarizes the extended discussion in *Burch* and reflects that when Virginia courts must classify an officer as state or local, they will determine whether the policies, responsibilities, and concerns of the officer bear a closer nexus to the state than to a local governmental entity.

Review of the relevant Virginia statutes disclose that electoral boards and registrars bear a closer nexus with the state than with the localities where they work. Electoral board members are appointed by state judges. The party affiliation of board members depends upon the party affiliation of the governor, not the party in power locally. They must take the oath of office prescribed for officers appointed pursuant to the state constitution. Va. Code Ann. § 24.1-29 (1985). Their compensation is set by the state's general appropriations act, and their salaries and mileage expenses are reimbursed from the state treas-

ury. § 24.1-31. They may be removed in proceedings initiated only by the State Board of Elections. The electoral boards do not have free rein in the appointment of general registrars. State law prescribes the number, terms, and duties of general registrars. §§ 24.1-43, 24.1-44, 24.1-46. Electoral boards must maintain uniform statewide practices and proceedings. § 24.1-19. The State Board of Elections has the power to promulgate regulations establishing and governing the duties of the electoral boards with respect to the state's central registration roster system, and electoral boards are bound by statute to follow such regulations to the exclusion of past practices. § 24.1-27. In short, local governing bodies have no measurable control over the appointment, discharge, compensation, duties, or policies of the electoral boards. These are matters of state concern entrusted to state agencies. Accordingly, we hold that the electoral board members were acting as state employees when they failed to rehire Kilgore and McConnell as general registrars.

Similarly, the position of registrar also bears a closer relationship to the state than to any locality. The duties of the general registrar are established by the General Assembly and set forth at length in Va.Code Ann. § 24.1-46 (1985). These duties are ministerial in nature, and local governing bodies have no authority or discretion to modify them. The qualifications for the registrar are determined by state statute. Like electoral board members, registrars' salaries are set by the General Assembly and reimbursed from the state treasury. Registrars must take the oath prescribed for officers appointed pursuant to the state constitution. The state sets their normal days of service. They may be removed only by the State Board

of Elections or their electoral board, not by any local governing body or official. §§ 24.1-43, 24.1-19, 24.1-34. The forms, procedures, and policies of the registrars are all determined by the state. We conclude that Cheek was acting as a state officer when he failed to rehire Burchett as assistant registrar.

The traditional principles of employer-employee law discussed by the district judge reinforce our conclusions. At common law, courts determined whether an employer-employee relationship existed by reference to four elements: (1) selection and engagement of the employee, (2) payment of wages, (3) power of dismissal, and (4) the power of control over the employee's actions. *Tidewater Stevedoring Corp. v. McCormick*, 189 Va. 158, 166, 52 S.E. 2d 61, 65 (1949). Of these factors, the power of control is most crucial, and it is the potential power of control, not the actual exercise of control, that is relevant. *Virginia Employment Commission v. A.I.M. Corp.*, 225 Va. 338, 347, 302 S.E.2d 534, 539-40 (1983). Here, the state sets and controls the procedure for selecting and hiring electoral board members and registrars. The state pays their compensation via reimbursement from the state treasury. The power to dismiss and fill vacancies is vested in the state. Finally, and most importantly, the state alone has the power to control the action, duties, and policies of electoral boards and registrars. We agree with the district judge that "the inescapable conclusion is that electoral boards and general registrars are dominated by the state." *Kilgore*, 637 F.Supp. at 125⁹. Since the appellants were acting as state employees, we proceed to discuss whether the eleventh amendment permits awards of damages against them in their official capacities.

V

As the Supreme Court noted in *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985):

Official-capacity suits . . . “generally represent only another way of pleading an action against an entity of which an officer is an agent.” As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official’s personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. (citations omitted)

Graham makes clear that the appellants are not personally obligated to pay any official capacity judgment entered against them. The question arises, therefore, whether these official capacity judgments can be collected from the state which, as *Graham* indicates, is the real party in interest.

There are two methods by which a state’s eleventh amendment immunity may be overcome, and neither method is applicable here. First, Congress may explicitly legislate to abrogate this immunity. As the district court correctly noted, § 1983 does not abrogate eleventh amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct.

1139, 1145, 59 L.Ed.2d 358 (1979).⁶ Second, the state may voluntarily waive its eleventh amendment immunity. However, as the Supreme Court noted in *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1360-61, 39 L.Ed.2d 662 (1974), waiver cannot be easily inferred from state legislative action:

In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

A review of the pertinent Virginia statutes reveals that the state has not waived its eleventh amendment immunity. Section 8.01-192, which generally governs recovery of claims against the state, waives sovereign immunity in actions brought in Virginia courts. But it does not express their clear legislative intent necessary to constitute a waiver of eleventh amendment immunity. *Croatian Books, Inc. v. Virginia*, 574 F.Supp. 880, 882-83 (E.D.Va. 1983); *Jacobs v. College of William & Mary*, 495 F.Supp. 183, 190 (E.D.Va.1980), *aff'd*, 660 F.2d 922(4thCir.1981). The Virginia Torts Claims Act, Va.Code Ann. § 8.01-195.1 *et seq.* (1984 & Supp. 1987), while generally waiving sovereign immunity for tort claims filed in state courts, does

6. Because the appellees' claims are based on § 1983, this case differs from *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), which allows back pay awards in actions brought under Title VII of the Civil Rights Act of 1964. *Fitzpatrick* explains that Congress, in passing Title VII for the purpose of enforcing the provisions of the fourteenth amendment, authorized "private suits against States or state officials which are constitutionally impermissible in other contexts." 427 U.S. at 456, 96 S.Ct. at 2671.

not waive the state's eleventh amendment immunity. *Reynolds v. Sheriff, City of Richmond*, 574 F.Supp. 90, 91 (E.D.Va.1983).

Nor do the statutes governing the state's insurance plan waive the state's eleventh amendment immunity. In 1986, the Virginia General Assembly enacted § 2.1-526.8(E) in order to extend insurance protection to registrars and electoral board members. However, the legislation creating the insurance plan states that "[a]lthough the provisions of this article are subject to those of [the Virginia Tort Claims Act], nothing in this article shall be deemed an additional expressed or implied waiver of the Commonwealth's sovereign immunity." Va.Code Ann. § 2.1-526.11 (1987).

In short, we find no Virginia statutes which can be construed to express the clear legislative intent necessary to render the state liable in damages in federal court for the acts of these appellants. The district court correctly found that the eleventh amendment barred the collection of these judgments from the state. But it erred in awarding damages against the appellants in their official capacities, because such an award is tantamount to a judgment against the state contrary to the prohibitions of the eleventh amendment. *See Graham*, 473 U.S. at 165-68, 105 S.Ct. at 3105-07.

VI

The district court held that the state's insurance carrier, Compass Insurance Company, was liable for the judgments entered in favor of the appellees. The policy named as an "insured" any person "duly constituted by or for the Commonwealth of Virginia as a State employee." It

defined "State employee" as "any person acting in an official capacity." There can be no doubt that the appellants were named insureds under the policy.

In the coverage clause Compass agreed

[t]o pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the Liability imposed upon him by law resulting from any claim made against the Insured arising out of the Insured's activities . . . including, but not limited to, sums which the Insured shall become obligated to pay pursuant to 42 U.S.C. § 1983 and 1988 and as a consequence of any court order issued thereunder.

The appellants, however, are not obligated to pay any sums. They are entitled to qualified immunity in their individual capacities. *Graham* establishes that they are not personally obligated to pay judgments entered against them in their official capacity. Consequently, the insurance does not afford coverage.

VII

The appellants' actions in failing to rehire the appellees violated the appellees' rights guaranteed by the first and fourteenth amendments. The decision of the district court finding such a violation is accordingly affirmed. Since the state's eleventh amendment immunity does not protect it from suits for injunctive relief governing its officials' future conduct, order of the district court requiring the appellants to rehire the appellees is also affirmed. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Because the appellants are entitled to qualified immunity, and since neither the state nor Compass Insur-

ance Company can properly be held liable in damages for acts of the appellants in their official capacities, the judgment of the district court awarding damages is reversed. We find no cause for reversal in the other assignments of error. Having substantially prevailed, the appellees shall recover their costs.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Nos. 86-1507
86-1604
86-1605
86-1606
86-1607
86-1608
86-1609
86-1610
86-1611
86-1619
86-1620
86-3011

(Filed Nov. 19, 1987)

Doris McConnell,

and

Willie B. Kilgore,

versus

Roger Adams, et al,

Scott County, Va.,

and

Susan H. Fitz-Hugh, et al,

Appellee,

Plaintiff,

Appellant,
Amicus Curiae,

Defendants.

On Petition for Rehearing with Suggestion for
Rehearing In Banc.

ORDER

The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner, with the concurrence of Judge Russell and Judge Sprouse.

For the Court,
/s/ John M. Greacen
CLERK

APPENDIX C

Willie B. KILGORE, Plaintiff,

v.

Katherine Jones McCLELLAND, Faye Owens and
Charles Herman Stallaró, Defendants.

Doris McCONNELL, Plaintiff,

v.

Roger ADAMS, Evelyn Bacon, and
Judy Carroll, Defendants.

Civ. A. No. 83-0090-B.

United States District Court,
W.D. Virginia,
Big Stone Gap Division.

Dec. 7, 1985.

As Corrected June 6, 1986.

Gary S. Bradshaw, Gate City, Va., Joseph E. Wolfe,
Norton, Va., Wm. H. Hurd, Bryand, Hurd & Porter,
Chesterfield, Va., for plaintiffs.

Henry S. Stout, Jr., and Florence Powell, Mullins,
Winston, Stout & Thomason, Norton, Va., for Adams,
Bacon and Lee County.

C. Dean Foster, Jr., Gate City, Va., for Scott County.

James P. Jones, Bristol, Va., Judy Carroll Williams,
Pennington Gap, Va., for Duncan, Cheek, McClelland and
Owens.

MEMORANDUM OPINION

KISER, District Judge.

Until April 1, 1983, the Plaintiffs, Doris McConnell and Willie Kilgore, were the general registrars of Lee and Scott Counties, respectively. In early March of 1983, as the expiration date of both Plaintiffs' terms approached, it became necessary that they be reappointed by the electoral boards of their respective counties in order to continue in office.¹ Neither Plaintiff was reappointed.

In January of 1982, a Democrat had replaced a Republican as governor of Virginia and with that change, the political composition of the electoral board of each county also changed from a Republican majority to a Democratic majority (i.e., one Republican and two Democrats). The change was mandated by statute.² The Plaintiffs had been

1. General registrars are appointed for four-year terms. The electoral board for the county is the appointing authority. See Va. Code §§ 24.1-43 and 24.1-44.

2. The statute, Va. Code § 24.1-29, provides in applicable part:

There shall be in each county and city an electoral board, composed of three members, who shall be appointed by a majority of the circuit judges of the judicial circuit for such county or city. If a majority of such judges cannot agree, the senior judge shall make such appointment. Any vacancy occurring in the boards shall be filled by the same authority for the unexpired term. The clerk of the circuit court shall send to the State Board of Elections a copy of each order making an appointment to an electoral board. In the appointment of the electoral board, representation shall be given to each of the two political parties having the highest and next highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election. A majority of the electoral board shall be from the political party which cast the highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election. . . .

appointed under a Republican governor and were Republicans. They were not reappointed and were replaced as general resitrars by two Democrats.

On March 30, 1983, the Plaintiffs filed the present case alleging that the Democratic majority on the boards had failed to reappoint them because of their political affiliations. Plaintiffs contended that the boards' actions violated their First and Fourteenth Amendment rights under the Constitution.³ The claims of the Plaintiffs were separated for trial and were presented to two separate juries. Both juries found that the sole motivation of the Defendants was political. The Kilgore jury awarded \$76,348.50, and the McConnell jury awarded \$79,399.89 in damages.⁴ Subsequent to the trials, various motions were filed, and

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3. Defendants Stallard and Carroll were Republican members of the electoral boards of Lee and Scott County and were named as parties only for the purpose of injunctive relief.
 4. The questions posed to the jury followed the Fourth Circuit model as set forth in *Jones v. Dodson*, 727 F.2d 1329 (4th Cir.1984). The jury in each case was asked to decide whether the electoral boards' failure to reappoint Plaintiffs was solely for political reasons, solely for non-political reasons, or a combination of both, i.e., mixed motives. The Kilgore jury selected the following response on the verdict form:

The Defendants, McClelland, [sic] and Owens, failed to re-appoint Willie Kilgore to the position of General Registrar of Scott County solely because of her political party affiliation (Republican).

The McConnell jury was given the same options on the verdict form submitted to it and reached the following identical conclusion to that of the Kilgore jury:

The Defendants, Bacon and Adams, failed to re-appoint Plaintiff McConnell to the position of General Registrar of Lee County solely because of her political party affiliation (Republican).

these post-verdict motions n.o.v. of the Defendants and motions for injunctive relief of the Plaintiffs are now before me.⁵

The cases of *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), are the Supreme Court's definitive decisions upon political firings. In *Elrod*, the Supreme Court held that the discharge of a deputy sheriff in the City of Chicago because of his political affiliations violated his First and Fourteenth Amendment rights. In so holding, however, the Court carved out an exception to the rule against politically motivated hirings and firings. It said that when the position was a confidential or policy-making one, then political considerations were permissible. Subsequently, the Court abandoned that exception and delineated a more narrow one. In *Branti*, the Court held that the only permissible reason for political affiliation to be a criterion for the hiring or firing of a person in a public job is that the performance of the job itself requires affiliation with a particular political party. The Court said:

In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

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5. Defendants in the Lee County matter have also raised the issue of the Court's failure to grant their mistrial motion during the course of the testimony of Patsy Burchett, the former assistant registrar under McConnell. This motion was ruled upon in open court and for the reasons stated into the record at the time, the mistrial motion was not granted. The Court does not need to address the issue again.

Id. 445 U.S. at 518, 100 S.Ct. at 1294. It is through this narrow window that the Defendants seek to escape liability in this case.

The argument of the Defendants and the Attorney General as *amicus curiae* is that political affiliation is a requirement of the job of general registrar of the county. They go to great pains to point out that the electoral process encompasses a grand plan under which the control of the election machinery shall be in the hands of the party of the incumbent governor. In support of this, they point out that the Secretary of the State Board of Elections changes and that the membership of the county electoral boards changes with the shift of political power. It is argued, therefore, that for the system to work in harmony, the general registrar of the county must also change. The weakness of this argument is that it does not square with the testimony in the case. Virtually all of the witnesses who testified on the matter, including Susan Fitz-Hugh, Secretary of the State Board of Elections, responded in the negative when asked whether affiliation with a particular party was required in order that a general registrar effectively perform his or her duties. These witnesses indicated that a Republican could do the job as well as a Democrat and vice versa.

The job of general registrar does not fit within the exception articulated in *Branti*; therefore, the failure to reappoint the Plaintiffs because of their political affiliations was a violation of their First and Fourteenth Amendment rights.

Res Judicata Defense

On March 1, 1983, the outgoing electoral boards of Lee and Scott Counties, which were dominated by Republi-

cans, undertook to reappoint McConnell and Kilgore to their respective positions. Three days thereafter, the incoming electoral boards for these counties, which were dominated by Democrats, appointed Democrats as general registrars. The actions of the outgoing and the incoming boards raised the issue of who had the power to make appointments to the office of general registrar. To resolve this dilemma, the Chairman, Earl W. Davis, the Vice Chairman, A. George Cook, III, and the Secretary, Susan Fitz-Hugh, of the State Board of Elections filed declaratory judgment actions pursuant to *Va. Code* § 8.01-184, *et seq.*, in the circuit courts of Lee and Scott Counties.⁶ McConnell was named as the Defendant in the Lee County suit, and Kilgore was named as the Defendant in the Scott County suit. None of the Defendants in the present suit was a party to the state suits.

The identical issue, whether the power of appointment rested with the outgoing board or with the incoming board, was litigated before both circuits. These courts resolved the dispute in favor of the incoming boards and held that their appointment of the new general registrars was a proper exercise of power. The First and Fourteenth Amendment issues, which are raised in the current federal suit, were not litigated nor decided in the state court actions. Yet the Defendants here insist that McConnell and Kilgore should be barred by the doctrine of *res judicata* (claim preclusion) from maintaining their federal action. I disagree.

6. The suits were filed on March 31, 1983, one day after the Plaintiffs had filed this suit in federal court.

The Defendants have failed to make the proper distinction between *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). The distinction is very clearly pointed out in the United States Supreme Court case of *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983). There, the Court said:

Like the federal courts, the courts of Virginia apply different rules of preclusion to matters arising in a suit between the same parties and based upon the same causes of action as those involved in the previous proceeding. Under the doctrine of *res judicata*, 'the judgment in the former [action] is conclusive of the later, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined, within the issues as they were made or tendered by the pleadings, or as incident to or essentially connected with the subject matter of the litigation, whether the same, as a matter of fact, were or were not considered.' *Eason v. Eason*, 204 Va. [347], at 350, 131 S.E.2d [280] at 282, quoting *Kemp v. Miller*, 166 Va [661], at 674, 186 S.E. [99], at 103-104. This doctrine does not apply, however, to a later action between different parties or to a later action between the same parties on a different claim or demand. *Ibid.*

Id. 462 U.S. at 315 n. 9, 103 S.Ct. at 2374 n. 9.

Since the state court action was not an action between the present parties and did not involve the same issues, it is clear that the doctrine of *res judicata* would not apply. The Lee County Defendants rely upon the decision of *Ferebee v. Hungate*, 192 Va. 32, 63 S.E.2d 761 (1951), as supporting their plea of *res judicata*. Not only does it fail to support their position, it is authority in opposition thereto. In *Ferebee*, the Virginia Supreme Court clearly de-

lineated the requirements that must be met to sustain a plea of *res judicata*, i.e., (1) identity of parties to the action; (2) identity of issues; and (3) mutual estoppel. More recently, the United States Court of Appeals for the Fourth Circuit in *1616 Reminc Limited Partnership, et al v. Commonwealth Land Title Ins. Co.*, 778 F.2d 183 (4th Cir.1985), affirmed a Virginia federal district court's rejection of a *res judicata* argument. A bankruptcy court had heard argument on the narrow issue of the proper interpretation of a paragraph of an escrow agreement entered into by the parties to the *Reminc* case. Nevertheless, the Fourth Circuit held that because the bankruptcy court had considered only one aspect of a series of agreements effecting a broad contractual relationship, the district court and bankruptcy cases were not identical for *res judicata* purposes. The circuit court did note, however, that collateral estoppel principles would preclude relitigation of issues already decided in the bankruptcy proceeding.

Even if we treat the Defendants' preclusion defense as that of collateral estoppel (issue preclusion), the Defendants fare no better. In *Prosise, supra*, the Supreme Court examined the rules of collateral estoppel that would be applied in Virginia, and in so doing determined that before the doctrine would apply, the court must find that in the prior litigation the issues which are to be precluded or collaterally estopped must have been actually litigated. The Court stated:

The courts of Virginia have long recognized that a valid final " 'judgment rendered upon one cause of action' " may bar a party to that action from later litigating " 'matters arising in a suit upon a different cause of action.' " *Eason v. Eason*, 204 Va. 347, 350,

131 S.E.2d 280, 282 (1963), quoting *Kemp v. Miller*, 166 Va. 661, 674-675, 186 S.E. 99, 104 (1936). [footnote omitted] However, "the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Ibid.* Unless an issue was actually litigated and determined in the former judicial proceeding, Virginia law will not treat it as final. See, e.g., *Luke Construction Co. v. Simpkins*, 223 Va. 387, 291 S.E. 2d 204 (1982); *Eason v. Eason*, *supra*. Compare *Brown v. Felsen*, 442 U.S. 127, 139, n. 10 [99 S.Ct. 2205, 2213 n. 10, 60 L.Ed.2d 767] (1979). Furthermore, collateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action. As the Virginia Supreme Court stated in *Petrus v. Robbins*, 196 Va. 322, 330, 83 S.E.2d 408, 412 (1954), "[t]o render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict could not have been rendered without deciding that matter." Cf. *Block v. Commissioners*, 99 U.S. 686, 693 (1879); *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845, n. 2 (CA9 1979).

462 U.S. at 314-15, 103 S.Ct. at 2373-74.

The issues of constitutional violations which are raised in the present litigation were neither framed by the pleadings in the state court nor were they litigated there. The state actions decided only the issue of which board had the power to make appointments of the general registrar pursuant to the statutes of Virginia covering these matters. Plaintiffs would be estopped from resurrecting this issue in the present action. They did not, however, attempt to relitigate the matter. Under the circumstances before

us, any plea of collateral estoppel (issue preclusion) must, therefore, fail.

Qualified Immunity

Defendants, who were sued in their individual capacities as well as in their official capacities as electoral board members, have raised a qualified immunity defense. The defense, if successfully made out, will insulate government officials sued in their individual capacities from liability for money damages. In *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed 2d 214 (1975), the Supreme Court stated a subjective test for the defense and, in the context of school disciplinary actions, held as follows:

[A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." *Pierson v. Ray*, 386 U.S. [547], at 557 [87 S.Ct. 1213, 1219, 18 L.Ed 2d 288]. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Seven years after the *Wood* decision, in the case of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L. Ed.2d 396 (1982), the Court moved away from subjective

considerations and established an objective test for determining whether an official sued in his individual capacity was shielded from money damages liability by qualified immunity. As enunciated by the *Harlow* Court, the standard required that the conduct at issue did “not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* 457 U.S. at 818, 102 S.Ct. at 2738 [emphasis supplied]. The Court further noted that generally the defense should fail when the law was clearly established “since a reasonably competent public official should know the law governing his conduct.” *Id.* at 819, 102 S.Ct. at 2738. In the more recent case of *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), the Court noted that “[e]ven defendants who violate constitutional rights enjoy qualified immunity . . . unless it is further demonstrated that their conduct was unreasonable under the applicable standard.” 104 S.Ct. at 3018, 82 L.Ed.2d at 147. The Court further stated that the defense may be overcome only when a plaintiff shows that the constitutional or statutory rights at issue “were clearly established at the time of the conduct at issue.” *Id.* 104 S.Ct. at 3021, 82 L.Ed.2d at 151.

In the present matter, the Supreme Court’s decisions in *Elrod* and *Branti* predated Defendants’ failure to reappoint Plaintiffs and thus the law regarding politically motivated hirings and firings was clearly established. The electoral boards that deprived Plaintiffs of their jobs met on March 4, 1983. The *Branti* case was decided on March 31, 1980. The individuals on the electoral boards who voted to replace Plaintiffs with Democrats as general registrars failed at trial to demonstrate that political party affilia-

tion was relevant to effective job performance. Because Plaintiffs' First and Fourteenth Amendment rights at issue in this case were clearly established and had been for several years, Defendants, as reasonably competent public officials, should have known the law applicable to their powers of appointment. Therefore, I find that Defendants have failed to make out a qualified immunity defense.

Damages

Two issues have been raised with regard to the money damages awarded by the juries. The named Defendants challenge the amount as being excessive, and the *amicus curiate* for the counties of Lee and Scott argue that the counties should not be held liable for damages awarded against the named Defendants.

The amount of damages is well within the bounds of the evidence. Basically, the awards are for the amount of salary the Plaintiffs would have received in their jobs for another four year term had they not been unlawfully discharged. This is entirely appropriate under the law and the evidence. Therefore, the motion based on this ground will be DENIED.

Because the Defendants were sued in their official capacities, the Court must determine under the decision of *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed 2d 878 (1985), whether the counties and/or the State of Virginia are also liable for the money damages awarded against the named Defendants. This requires the resolution of two basic questions. First, were the Defendants acting in their official capacity so as to impose liability under *Monell v. New York City Department of Social*

Services, 436 U.S. 658, 98 S Ct. 2018, 56 L.Ed.2d 611 (1978), and *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), and if so, did their employer have ample notice as required by *Brandon*? Second, were the named Defendants officials of their respective counties or were they state officials? As to the second issue, a declaratory judgment action entitled *Katherine McClelland and Faye Owens v. Republic Insurance Company and The Compass Insurance Company*, Civil Action No. 83-0223, is presently pending in the Court

Counsel for Scott County has moved the Court to abstain from deciding the issue of the county's liability until the declaratory judgment action can be heard. I feel it would be unfair to subject the Plaintiffs to such a delay. To resolve the issue of the liability of Lee County and Scott County, the court will set this issue for hearing and will permit all interested parties to participate in the hearing as well as to submit briefs in support of their respective positions prior to the hearing. Parties to the declaratory judgment action who are not already parties to this suit as well as the counties of Lee and Scott will be included.

Plaintiffs' Motion for Injunctive Relief

The Plaintiffs are entitled to injunctive relief to restore them to the positions of general registrar of their respective counties, but I must take into account the present occupants of the positions so as not to impose an undue hardship upon them. The evidence in the related case of *Burchett v. Cheek and County of Lee*, Civil Action No. 85-0065, revealed that W.R. Hines, the present general

registrar of Lee County, worked for a few months in 1983 as an unpaid assistant and in the summer of 1985 took the job of registrar on an interim basis to replace Phillip Cheek, who had resigned from the position for other employment. It appears to me, therefore, that it would work no undue hardship upon Mr. Hines to surrender the job in the very near future. The most logical time for the change to take place would be April 1, 1986, which would leave one full year remaining on the term. I will, therefore, enter an injunction removing Mr. Hines from the position as of that date and requiring the electoral board in Lee County to fill the vacancy with Plaintiff McConnell. As the money damage award to Mrs. McConnell was in part to compensate her for the entire four-year term for which she was not reappointed, it will be reduced by any amounts of compensation she receives in her work as general registrar from April 1, 1986, to April 1, 1987.

The Scott County position of general registrar presents a more difficult problem. That office is presently occupied by Glenda Duncan. There is no evidence that she had any complicity in the failure of the electoral board of Scott County to reappoint Plaintiff Kilgore, nor is there any evidence that Duncan took the job other than in good faith. Her appointment was for four years, and it would work an undue hardship upon her to require her to cut her term short. Therefore, I will permit her to finish out her term if she so chooses. At the expiration of her term or should the office become vacant prior to the expiration of her term, I enjoin the board to reappoint Mrs. Kilgore to that office. Should Mrs. Kilgore assume office before the expiration of the present term, her money

damage award will likewise be reduced by the amount of salary she receives to April 1, 1987, the end of the term.

Attorneys' Fees

Plaintiffs' attorneys have filed motions for attorneys' fees. The fee award issue is a collateral matter and cannot be ascertained until the case is completed in this Court. Consequently, the matter of attorneys' fees shall be deferred until all other issues have been resolved.

ORDER

In accordance with the Memorandum Opinion filed on this date, it is ORDERED that:

1. Defendants' post-trial motions are DENIED.
2. Plaintiffs' motions for injunctive relief are GRANTED to the following extent:

a. Lee County: The Defendant Electoral Board is hereby enjoined to terminate the present general registrar, W.R. Hines, as of the close of business on March 31, 1986, and to appoint Plaintiff McConnell as general registrar effective April 1, 1986. Plaintiff McConnell's money damage award in this lawsuit shall be reduced by an amount which corresponds to compensation she receives as general registrar between April 1, 1986 and April 1, 1987.

b. Scott County: The present general registrar Glenda Duncan, shall be permitted to serve her full term or as much of it as she chooses. The Defendant Electoral Board is enjoined to appoint Plaintiff Kilgore to resume her duties on April 1, 1987, or when Duncan leaves office, whichever is earlier. Any damages awarded to Kilgore

in this lawsuit shall be reduced by an amount which corresponds to the compensation she receives if she becomes general registrar prior to April 1, 1987.

3. A hearing will be set to resolve as expeditiously as possible the issue of the liability of Lee and Scott counties for damages awarded in this case.

4. Decision on Plaintiffs' motion for attorneys' fees is deferred until all other issues in this case have been resolved.

Patsy BURCHETT, Plaintiff,

v.

Phillip Lee CHEEK and County of
Lee, Defendants.

Civ A. No. 85-0065-B.

United States District Court,
W.D. Virginia,
Big Stone Gap Division.

Dec. 18, 1985.

Cynthia D. Kinser, Pennington Gap, Va., for plaintiff.

Gregory E. Lucyk, Asst. Atty. Gen., Richmond, Va.,
for Fitz-Hugh.

Henry Keuling-Stout, Mullins, Winston, Keuling-
Stout, Thomason & Harris, Norton, Va., for Phillip Lee
Cheek and County of Lee.

MEMORANDUM OPINION

KISER, District Judge.

I. Introduction

A jury trial was held in the above-captioned matter on September 11-12, 1985. In response to special verdict questions, the jury found that Plaintiff was not reappointed to her position as assistant general registrar of Lee County, Virginia, solely because of her political party affiliation, specifically with the Republican party. The jury awarded compensatory damages in the amount of \$40,000.00. Post-trial motions were subsequently filed and briefed and are now ready for resolution.

II. Background

This federal action and the related case of *Kilgore v. McClelland, et als.* and *McConnell v. Adams, et als.*, 637 F.Supp. 1241 (hereinafter referred to as *Kilgore/McConnell* case), arose as a result of the 1981 gubernatorial election in which a Democrat replaced a Republican as governor of Virginia. A controversy developed over who had been appointed by the county electoral board as the general registrar in Lee County¹ and on April 1, 1983, according to the testimony at trial, Defendant Phillip Cheek, a Democrat, arrived at the registrar's office to begin work. Doris McConnell, Cheek's predecessor, and a Republican, claimed that she had been reappointed and had filed the related federal case mentioned above.

McConnell was the assistant registrar in Lee County beginning in 1974 and from 1977 until Cheek took over, she

1. A full discussion of this controversy is found in the Memorandum of this Court filed on December 7, 1985, with regard to post-trial motions in the *Kilgore/McConnell* case and will not be repeated here.

had served as general registrar. Plaintiff Burchett had begun her work as assistant registrar to McConnell in June of 1977 and thought she would be continuing in her position when Cheek took office. Cheek, however, terminated Plaintiff upon her arrival at work on April 1.²

Although Plaintiff asked to be considered for the assistant registrar's position and submitted resumes to Cheek, she was not contacted by him for an interview nor was she rehired. Instead, W.R. Hines worked unpaid as assistant registrar up until the 1983 election and in January, 1984, Sue Willis became Cheek's paid assistant registrar. Cheek left office as of July 1, 1985, and became a state trooper. Hines replaced Cheek as general registrar. The questions answered affirmatively by the jury focused on two relevant time periods: the interval between April 1, 1983, and January 17, 1984 (when Sue Willis was appointed) and between January 17, 1984, and the present time. The jury found that Cheek's failure to reappoint Burchett during both periods was based solely on Plaintiff's affiliation with the Republican party.³ The damage

2. The applicable statute, Va. Code § 24.1-45, provides that the general registrar has the authority to appoint assistants, the number and term of whom are set by the county electoral board. The general registrar establishes the duties of the assistants and is empowered "to remove any assistant registrar who fails to discharge the duties of his office." The term of an assistant may not extend beyond that of the incumbent general registrar, which under Va. Code § 24.1-44, is set for four years, commencing on April 1, 1983, and every four years thereafter.

3. As in the *Kilgore/McConnell* case, the questions posed to the jury followed the Fourth Circuit model as set forth in *Jones v. Dodson*, 727 F.2d 1329 (4th Cir.1984). The special

award was essentially equal to the wages Plaintiff lost in being deprived of a four-year term as assistant registrar.

III. Discussion

Defendants' motions ask for a judgment n.o.v. as well as for a ruling that the good faith immunity doctrine insulates Cheek in his personal capacity from liability for money damages. Moreover, they argue that this case falls within the rationale of *Whited v. Fields*, 581 F.Supp. 1444 (W.D.Va.1984), as an exception to the rulings against politically motivated hirings and firings in the landmark cases of *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). Plaintiff has urged the Court to affirm the jury verdict in her favor, to order her reinstatement, and to award her attorney fees.

(Continued from previous page)

verdict form asked the jury to decide whether Cheek's failure to reappoint Plaintiff was solely for political reasons; solely for non-political reasons, or a combination of both, i.e., mixed motives. The jury selected the following responses:

I. As to appointment for period of time from April 1, 1983 to January 17, 1984: . . .

A. The Defendant, Cheek, failed to re-appoint Plaintiff Burchett to the position of Assistant General Registrar of Lee County solely because of her political party affiliation (Republican). . . .

II. As to appointment from [sic] period of time from January 17, 1984 until present time:

A. The Defendant, Cheek, failed to re-appoint Plaintiff Burchett to the position of Assistant General Registrar of Lee County solely because of her political party affiliation (Republican).

The *Elrod* and *Branti* cases were discussed at pages 2-4 of my December 7, 1985, Memorandum Opinion in the *Kilgore/McConnell* case, and that discussion is incorporated by reference herein. Both *Elrod* and *Branti* addressed political firings of or failure to reappoint assistants or deputies, and as the *Branti* Court noted, "After *Elrod*, it is clear that the lack of a reasonable expectation of continued employment is *not* sufficient to justify a dismissal based solely on an employee's private political beliefs." 445 U.S. at 512 n. 6, 100 S.Ct. at 1291 n. 6 [emphasis supplied]. In *Branti*, which is more directly applicable to the facts of the present case, the terms of assistants expired when the six-year term of the public defender expired. The Court nevertheless held that the newly-appointed public defender, whose political party affiliation differed from that of his predecessor, could not terminate assistants of the other party solely for political reasons absent a showing "that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518, 100 S.Ct. at 1295. No such showing was made in *Branti*, and the Supreme Court affirmed the entry of an injunction against termination of the employment of the assistant public defenders.

The same rationale utilized in *Branti* requires that this Court order the reinstatement of Burchett as assistant registrar in Lee County, Virginia. Testimony at trial, including that of Defendant Cheek, was uncontradicted that political party affiliation of an assistant registrar is irrelevant to effective job performance. The *Whited* case, upon which Defendants rely, has been discussed in both of the post-trial briefs. I agree with Plaintiff's conclusions that the *Whited* case is readily distinguishable from

the present one. In *Whited* the federal district court focused narrowly on the "alter ego" relationship of deputies with the county sheriff. In fact, the court accepted the newly-elected sheriff's testimony "that the election in 1983 in Russell County, Virginia was between him and Price's [the retiring former sheriff's] deputies, not between him and Martin [his opponent]." 581 F.Supp. at 1456. The court further noted that "there is no higher benefit in all our system of government than that of preserving the benefit of a person's vote" and permitted the new sheriff to discharge deputies, as well as jailers, on pure patronage grounds.

A major difference between *Whited* and the present case is that in *Whited* the hiring authority, i.e., the sheriff, was an elected official and the plaintiff deputies had actively campaigned for his opponent. Moreover, Fields, the new sheriff, had run on the promise of "cleaning house", and his landslide victory showed support by the electorate of such a move. In contrast, Patsy Burchett had no input or control over the appointment of general registrar. Cheek's testimony that he felt the assistant could not serve longer than his or her hiring authority, i.e., the former general registrar, is contrary to both *Elrod* and *Branti*. Assuming *arguendo* that Burchett had no reasonable expectation of continued employment, both cases nevertheless condemn dismissals based solely on party affiliation.

Cheek has raised a qualified immunity defense in an effort to insulate himself in his individual capacity from liability for the damages awarded by the jury. The basic principles of this defense were discussed at pages 9-11 of

my December 7, 1985, Memorandum Opinion in the *Kilgore/McConnell* case and will not be repeated here. My conclusions with regard to Cheek mirror those reached in the *Kilgore/McConnell* matter

The test to be used in determining whether the defense applies is an objective one and focuses on whether the conduct at issue violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The *Harlow* Court further noted that "a reasonably competent public official should know the law governing his conduct" and that the defense should generally fail when the law is clearly established. *Id.* at 819, 102 S.Ct. at 2739. The *Elrod* and *Branti* decisions were rendered by the Supreme Court several years prior to Cheek's termination of Burchett from her position as assistant registrar. Cheek must be held to the knowledge that reasonably competent public officials would have had. Under the circumstances, he should have known the clearly established law applicable to his appointment of an assistant. He has failed to make out a qualified immunity defense.

As noted above, the damages awarded by the jury essentially corresponded to the salary Plaintiff would have received during an additional four-year term as assistant registrar. The award is entirely appropriate under the evidence. Because the individual Defendant was sued in his official capacity, however, the Court must determine whether, under the holding in *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), liability for the money damages may be imposed on the entity represented

by Cheek. As I noted at pages 1247-1248 of my December 7, 1985, Memorandum Opinion in the *Kilgore/McConnell* matter, such a determination requires resolution of two basic questions. First, it must be decided whether Defendant was acting in his official capacity so as to impose liability pursuant to *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), and if so, under the *Brandon* standard, did the employer have ample notice and opportunity to defend? Second, the question of whether Cheek was a county or a state official must be resolved. In the present matter, although the electoral board of Lee County appointed Cheek as general registrar and the county was named as a Defendant, the hybrid nature of the general registrar's position presents problems.

A declaratory judgment action entitled *Katherine McClelland and Faye Owens v. Republic Insurance Company and The Compass Insurance Company*, Civil Action No. 83-0223, is presently pending in this Court to resolve whether county electoral board members are state or county employees.

As I indicated in the *Kilgore/McConnell* decision, a hearing to resolve the issue of county and/or state liability is appropriate. At that hearing, all interested parties may participate and before the hearing may submit briefs supportive of their position.

As I have already stated, Plaintiff is entitled to injunctive relief to restore her to her former position as assistant registrar in Lee County. Doris McConnell will be restored to her former position of general registrar ef-

fective April 1, 1986, at which time she shall reinstate Burchett as assistant registrar.⁴ Plaintiff Burchett's money damage award shall be reduced by an amount which corresponds to her compensation between April 1, 1986, and April 1, 1987, the expiration date of the four-year term at issue in the present case.

Plaintiff's attorney has filed a motion for attorney's fees. As in the *Kilgore/McConnell* case, the fee award issue is a collateral matter and shall be deferred pending resolution of all other issues in this litigation.

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record in this case, to all counsel of record in the *Kilgore/McConnell* matter, as well as the *amicus curiae* and counsel for Scott County, and to all counsel of record in the declaratory judgment action docketed in this Court at Civil Action No. 83-0223.

4. Pursuant to Federal Rule of Civil Procedure 25(d)(1), Cheek's successor, W.R. Hines, has been substituted as a defendant for official capacity aspects of this case. When McConnell assumes office as general registrar, she will be substituted and she is thus enjoined to reappoint Burchett at that time.

A-51

Willie B. KILGORE, Plaintiff,

v.

Katherine Jones McCLELLAND, Faye
Owens and Charles Herman
Stallard, Defendants.

and

Doris McCONNELL, Plaintiff,

v.

Roger ADAMS, Evelyn Bacon, and
Judy Carroll, Defendants.

Patsy BURCHETT, Plaintiff,

v.

Phillip Lee CHEEK and County of
Lee, Defendants.

Katherine McCLELLAND and Faye
Owens, Plaintiffs,

v.

REPUBLIC INSURANCE COMPANY
and Compass Insurance Company,
Defendants.

Civ. A. Nos. 83-0090-B, 85-0065-B.
United States District Court,
W.D. Virginia,
Big Stone Gap Division.

April 28, 1986.

Gregory E. Lucyk, Asst. Atty. Gen., Richmond, Va. for
Fitz-Hugh.

Henry Keuling-Stout, Mullins, Winston, Keuling-
Stout, Thomason & Harris, Norton, Va., for Phillip Lee
Cheek.

Gary S. Bradshaw, Gate City, Va., Joseph E. Wolfe, Wolfe & Farmer, Norton, Va., Wm. H. Hurd, Bryant, Hurd & Porter, Chesterfield, Va., Cynthia D. Kinser, Pennington Gap, Va., for plaintiffs.

Henry S. Stout, Jr., Florence Powell, Mullins, Winston, Stout & Thomason, Norton, Va., for Adams, Bacon and Lee County.

C. Dean Foster, Jr., Co. Atty., Gate City, Va., for Scott County.

James P. Jones, Bristol, Va., Judy Carroll Williams, Pennington Gap, Va., for Duncan, Cheek, McClelland and Owens.

MEMORANDUM OPINION

KISER, District Judge.

On January 9, 1986, a hearing was held in the above-captioned matters pursuant to the memorandum opinions of this Court filed on December 7 and December 18, 1985, in the cases docketed as Civil Numbers 83-0090-B and 85-0065-B. As noted in the December 7 memorandum opinion, Defendants were sued not only in their individual capacities but also in their official capacities, and thus an issue remains of whether they were acting in their official capacities so as to impose liability for the damages awarded on the body whose policy or custom Defendants were effecting or carrying out.

Under the aegis of *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), local governments were no longer insulated from liability in actions brought under 42 U.S.C.

§ 1983. The *Monell* case overruled the earlier holding of the United States Supreme Court in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) that a local government was not "a person" for § 1983 purposes. Thus, under the holding in *Monell*, official capacity suits could be maintained against the entity for whom an individual defendant was an agent if a government custom or policy was being carried out by that agent. Furthermore, the *Monell* case makes it clear that the custom or policy in question need not have been officially adopted or formally approved by the governmental entity. The Court concluded that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694, 98 S.Ct. at 2037.

Two years later in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), a divided Court decided that governmental entities are not entitled to qualified immunity through asserting the good faith of their officials when such entities are sued under § 1983 for constitutional violations. In reaching this conclusion, the Court answered the question left unresolved in *Monell* of "whether local governments, although not entitled to an absolute immunity, should be afforded some form of official immunity in § 1983 suits." 445 U.S. at 624, 100 S.Ct. at 1402. In rejecting an immunity defense, the *Owen* majority opinion concluded that its decision fairly allocated the costs of official misconduct by reaffirming the availability of the good faith immunity defense to officials whose conduct led to the constitutional deprivation while

assuring a remedy for the "innocent individual who is harmed by an abuse of governmental authority." *Id.* at 657, 100 S.Ct. at 1418. The victim's remedy would be borne by the populace as a whole as represented by the entity whose policy or custom was behind the injury. *Id.*

The *Monell* case was relied upon by the United States Court of Appeals for the Fourth Circuit in *Avery v. County of Burke*, 660 F.2d 111 (4th Cir.1981) when it vacated a summary judgment granted below for the county and two boards that were in reality extensions of the county. The appellate court held that although single or isolated incidents generally do not establish the kind of inaction upon which a 42 U.S.C. § 1983 claim may be based, nonetheless the conduct of the boards in failing to promulgate policies and regulations which would have provided proper training and information to employees of board-run agencies and allowed plaintiff to make an informed choice regarding voluntary sterilization could rise to deliberate indifference or tacit authorization of the unwarranted medical procedure. In other words, inaction could rise to the level of depriving one of a constitutional right. Certainly it can be argued in the present case that the entity responsible for promulgating guidelines for electoral boards and general registrars may be liable by reason of its inaction on the political firing question and the resulting constitutional deprivations incurred by Kilgore, McConnell, and Burchett.

Quite recently, *Monell* was discussed and its holding refined by the Supreme Court in *Pembaur v. City of Cincinnati*, — U.S. —, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). In *Pembaur*, a divided Court addressed the issue of

whether, and under what conditions, a decision by municipal policymakers on a single occasion could satisfy the *Monell* requirement that municipal liability under § 1983 must be confined to situations in which a municipal policy lay behind the deprivation complained of. Citing *Owen*, *Monell*, and *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), the *Pembaur* Court concluded:

If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.

— U.S. at —, 106 S.Ct. at 1292.

The Court's opinion emphasized that the relevant inquiry is whether final authority to make such policy was delegated by the municipality to the official whose actions are at issue rather than whether the action occurred numerous times. The Court summarized its position as follows: "We hold that municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* In the circumstances presently at issue, it is beyond doubt that the electoral boards and general registrar were delegated policymaking authority for the governmental entities they represented. Particularly un-

der the *Pembaur* holding it is clear that a policy may be set by a single action of a policymaker.

In the present matters it is, therefore, beyond dispute that the governmental entities whose customs or policies were being set or carried out by the electoral boards in Scott County and Lee County, Virginia, would be liable for the constitutional violations occasioned by the officials putting such customs or policies into effect. The same rationale applies equally to the *Burchett* case and the governmental entity whose policy or custom was responsible for Patsy Burchett's loss of her position as assistant registrar in Lee County.

Adding another twist to the present matter is the holding in *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985) that in a § 1983 action judgment against a public servant in his official capacity imposes liability for damages on the governmental entity he represents if the entity received notice and an opportunity to respond to the charges. In *Brandon*, the plaintiffs were permitted to amend the pleadings after trial to include a municipality as defendant. The Court noted, referring to its decisions in *Monell*, *Owens*, and *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978),

In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity received notice and an opportunity to respond. [footnote omitted]. We now make that point explicit.

In the *Kilgore*, *McConnell* and *Burchett* cases tried before this court, Defendant electoral board members who failed

to appoint McConnell and Kilgore to continue as general registrars in their respective countries and Philip Cheek, the general registrar who fired and later refused to hire Burchett as his assistant in Lee County, were sued in their individual and in their official capacities. In all three cases, the court has determined that no good faith immunity defense was made out so as to insulate these defendants from individual liability for money damages.

Insofar as the electoral boards are concerned, it cannot be seriously argued that they were doing anything other than carrying out the official policy of the entity for whom they were acting, whether it be the county or the state. The board members, in selecting the general registrar for their county, were obviously acting in their official capacity. Likewise, Cheek's actions with regard to Burchett were taken within his official capacity.

All of the individual Defendants were performing functions designated under state law. In meeting and appointing a general registrar, an electoral board and its members are carrying out the specific mandate of *Va.Code* § 24.1-43. In appointing an assistant registrar, Phillip Cheek was acting pursuant to the provisions of *Va.Code* § 24.1-45, which empower general registrars to appoint assistant registrars. Defendant board members and Cheek were unquestionably acting within the statutory authority delegated to them under the laws of Virginia. Thus, their actions were official actions of the governmental entity or entities whose custom or policy they were carrying out or, more properly, were setting. Defendants, therefore, are also liable in their official capacities. The issue remains, however, of whether Defendants were

carrying out and/or setting state or county custom or policy or a combination of policies of both entities. As a footnote in the *Monell* opinion pointed out, “[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. . . .” 436 U.S. at 690 n. 55, 98 S.Ct. at 2035 n. 55. See also *Kentucky v. Graham*, 437 U.S. —, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

As noted previously, the *Brandon* holding that bringing an official capacity suit against an agent of a governmental entity is tantamount to bringing suit against the entity itself contains the proviso that the entity must have received notice and had an opportunity to respond. No problem exists with the notice or response opportunity requirement insofar as the counties of Lee and Scott or the Commonwealth of Virginia are concerned. The original complaints filed on March 30, 1983, in the *McConnell* and *Kilgore* cases, which were later consolidated as Civil Action Number 83-0090, named the counties as Defendants and service was made on the attorneys for these counties. The complaints also named Susan Fitz-Hugh, Secretary of the State Board of Elections, as a Defendant. Fitz-Hugh was represented by the Office of the Attorney General of Virginia. Moreover, one day after the *Kilgore* and *McConnell* complaints were filed in federal court, Fitz-Hugh, later joined by the two other members of the State Board of Elections, filed a declaratory judgment action in the circuit courts of Lee and Scott counties to determine whether the incoming or outgoing electoral boards were empowered to appoint general registrars.

Both counties and the Commonwealth filed motions to dismiss in the *Kilgore/McConnell* federal action. In June

20, 1983, Plaintiffs' motion to nonsuit the action as to Fitz-Hugh and the counties plus general registrars Phillip Cheek and Glenda Duncan was granted, and these Defendants were dismissed without prejudice. On July 6, 1983, the court granted the motion of the Commonwealth, representing the three members of the State Board of Elections, for leave to appear, file a brief, and make oral arguments as *amicus curiae*. A similar *amicus curiae* motion filed on behalf of Scott County was granted on August 5, 1983. Counsel for Lee County fully participated in trial of the *McConnell* matter. By court order dated September 8, 1983, Henry Keuling-Stout became counsel of record to represent the two electoral board members who had failed to reappoint McConnell as general registrar. The same attorney represented Lee County and Phillip Cheek in the *Burchett* case. The Commonwealth, moreover, was also well aware of the *Burchett* action because Susan Fitz-Hugh was a named defendant and was dismissed from the case without prejudice on June 11, 1985. Following separate trials of the *Kilgore* and *McConnell* matters on July 9-11, 1985, and verdicts for Plaintiffs, post-trial motions were filed. Counsel for the counties and the Commonwealth participated fully in the hearing held on those motions on September 11, 1985, and were permitted to file briefs in support of their respective positions. Under the circumstances, I have decided that the *Brandon* criteria regarding notice and opportunity to respond have been completely satisfied.

With regard to the issue of whether the electoral board members and general registrar were county or state employees, persuasive arguments supporting each conclusion exist. The real inquiry, however, should be whose

policy were the individual Defendants setting or carrying out. When focus is made on this question, the conclusion must be that the state's involvement far outweighed that of the county.

Virtually every action of the electoral board is governed by state law. Because the county does participate in certain aspects of the board's functioning, an argument that the board members have dual state/county roles can be made. Nevertheless, it is clear that county involvement not only is extremely limited but is itself governed by state law. The role of the county vis a vis electoral boards is delineated almost exclusively in the provisions of *Va. Code* § 24.1-31, which address payment of compensation (salary) and expenses of board members. The general appropriations act of the Commonwealth governs annual compensation of board members and the Commonwealth reimburse each county for its payment of salaries, for costs up to \$300 incurred for conducting the electoral process, and for mileage for board members. Other than not being reimbursed for excess costs as mentioned above, counties are required to furnish to the board only postage, stationery, and "a bound book for the minutes of its proceedings."

The county's sole input into the appointment of board members, as delineated in *Va. Code* § 24.1-29, is indirect at best. Vacancies on the board are filled by appointment made by a majority of the circuit judges, who, although their jurisdiction encompasses a particular geographical area, are nonetheless state officers. Because the majority makeup of the three member electoral board must reflect the party with the highest number of votes at the last pre-

ceding gubernatorial election, the local political party from whose membership any vacancy will be filled may suggest at least three names as potential appointees. The political party in control statewide of the governorship, therefore, will control the electoral board, even though that party is the minority party in the county where the board sits.

State law, specifically *Va.Code* § 24.1-30, establishes meeting, quorum, and recordkeeping requirements, none of which are subject to county control. Moreover, the county has no control over the removal of a general registrar from office or in filling the position when a vacancy occurs. Pursuant to *Va.Code* § 24.1-34, these powers are solely those of the electoral board. In summary, although electoral boards are appointed to function within a particular location, guidelines and regulations for their existence and operation are almost wholly mandated by the statutory law of the Commonwealth. When the question of whose policy the boards were setting when they appointed a general registrar in both Lee and Scott counties is considered, it appears clear that they were executing state policy. The state saw fit to delegate this appointment power to electoral boards rather than vest it in the State Board of Elections.* In delegating this authority, the state in effect authorized local electoral boards to set state policy. In exercising the appointment power so delegated, the boards engaged in action directly traceable to the state.¹

1. In reaching the conclusions discussed *supra*, I am mindful of *Va.Code* § 24.1-32 which provides that various election

(Continued on following page)

The same line of reasoning applicable to the electoral boards applies as well to the general registrar's appointment of an assistant registrar. Pursuant to *Va. Code* § 24.1-45, the electoral board determines the number of assistants a general registrar may have and also sets the term of office, which may not extend beyond that of the incumbent general registrar. The statute requires at least one assistant working one day a week when the population exceeds 15,500. The general registrar sets the duties of the assistants and may remove those who fail to perform these duties. Under the same statute the compensation of the assistant must meet federal minimum wage standards, but is fixed and paid by the locality. In contrast, *Va. Code* § 24.1-43 provides that the general registrar be compensated, as is the electoral board, in accordance with the Appropriations Act of the state. This compensation, as is that of the electoral board, is paid by the local entity but is reimbursed from the state treasury.² The county has no actual control over the actions of the general registrar.

(Continued from previous page)

officials, including electoral board members and general registrars, "shall be deemed, for purposes of Title 65.1 [workers' compensation], to be employees of the respective cities or counties in which they serve." The rationale behind this workers' compensation provision, however, is easily distinguishable from the rationale leading to my conclusions. Injuries arising out of or in the course of employment are more logically connected with a local entity. Exercising an authority delegated by the state, as in the present case, is more logically connected with the state and the state should be responsible for the compensation awarded.

2. The statute provides that if a county pays its registrar more than the amount set by state law, the state treasury shall not reimburse the county for such supplements. Supplements, however, were not provided by Lee and Scott counties.

Instead, its obligations to and dealings with the registrar are financial, i.e. providing office space, supplies and equipment, postage, stationery, and telephone service. The county is also obligated to pay certain other expenses, such as mileage, but only after these expenses are approved by the State Board of Elections.

Traditional principles of master-servant law likewise reinforce my conclusions that the electoral boards and general registrar were acting for and carrying out or setting state policy. When the four elements of traditional master-servant analysis are examined, the inescapable conclusion is that electoral boards and general registrars are dominated by the state. First, the state has promulgated the statutes controlling selection and engagement of these officials. Circuit judges select electoral boards and the boards in turn appoint general registrars. The counties have no control over the appointment or removal process. Second, the compensation of board members and registrars is essentially set by the state and although paid locally, is reimbursed from the state treasury. The county has little role other than advancing funds subject to reimbursement and providing a work place and the "tools" to perform the tasks. Third, the power of dismissal and filling vacancies is vested solely in the state, and the county has no input whatsoever. Last, control of the actions of the board and of the registrars is under state control. Only the state could have promulgated directives to electoral boards regarding the propriety of appointing general registrars solely on the basis of political party affiliation. Likewise, the state, as the sole publisher of guidelines or handbooks for general registrars, could have admonished these officials not to use political party affiliation in determining

whom to appoint as their assistant(s). In the *Burchett* case, Defendant Cheek testified to his contacts with the Secretary of the State Board of Elections, who informed him that he was free to appoint whomever he wished as his assistant. Without deciding whether there could be *any* circumstances under which electoral boards and/or general registrars could be employees of the locality where they serve or could be deemed as carrying out or setting local custom or policy under the circumstances of the present matters, I must conclude that the actions complained of were taken while executing state custom or policy.

Although the state's policy was being executed by the individual Defendants in the present case, this does not render the state liable to the Plaintiffs for money damages because the Eleventh Amendment provides immunity for the state against such recoveries. The state is subject to prospective injunctive relief, *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), but the Eleventh Amendment stands as a complete bar against recovery of money damages from the state unless the state waives its immunity, either expressly or impliedly, or an act of Congress abrogates that immunity pursuant to powers granted to Congress in § 5 of the Fourteenth Amendment.³ There is no contention by any of the parties in the case that the Commonwealth of Virginia has waived its immunity nor can there be a serious contention that Congress by enacting 42 U.S.C. § 1983 intended to abrogate the state's Eleventh Amendment immunity. See *Quern v. Jordan*, 440 U.S. 332,

3. This Court has recently rendered the decision in *Anderson v. Radford University*, 633 F.Supp. 1154 (W.D.Va.1986), which fully discusses the "waiver" and "abrogation" methods of overcoming the Eleventh Amendment bar.

99 S.Ct. 1139, 59 L.Ed.2d 358 (1978) and *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

Counsel for the Plaintiffs and counsel for Defendants McClelland and Owens urge that the Eleventh Amendment does not apply to bar monetary recovery from the state when it is ancillary to injunctive relief. This argument was specifically addressed and rejected in the *Edelman* holding, which states that a retroactive award, by whatever name it is called, that requires the payment of funds from the state treasury is barred by the Eleventh Amendment. Consequently, the argument must be rejected.

Thus, even though the named Defendants were executing state policy, the Commonwealth of Virginia is not liable to the Plaintiffs for the money damages awarded by the jury. This does not mean, however, that the state has abandoned its employees to suffer the monetary hardships which may be imposed upon them by reason of performing their functions as state employees. Virginia had the foresight to procure insurance for its employees to provide for such eventualities.

The final issue requiring resolution in this matter focuses on the declaratory judgment action filed by Katherine McClelland and Faye Owens against Republic Insurance Company and Compass Insurance Company to resolve the question pertaining to insurance coverage.⁴ Republic, the insurer of Scott County, and Compass, the state

4. This action is one that involves only the Scott County Defendants who would be liable for damages in the *Kilgore* matter because Lee County provided representation for the electoral board members and general registrar in the *McConnell* and *Burchett* matters.

insurer, both denied coverage. Republic's position initially was grounded in its belief that electoral board members were state employees although it conceded that it had issued a liability insurance policy that would cover certain officials and employees of Scott County. Compass' stance, as evidenced in a letter dated July 25, 1983, to counsel for the board members was as follows:

In view of a recent opinion of the Attorney General of Virginia, The Compass Insurance Company has taken the position that members and employees of local Boards of Election are not State employees and are, therefore, not covered by the Policy. In the event, however, of a final judicial determination that such persons legally are State employees, then the position of The Compass Insurance Company would be that they are covered by the Compass Policy.

The Court has reviewed the entire file on the declaratory judgment action and has examined both policies, as well as the deposition of Billie Lynch, the county administrator of Scott County. Ms. Lynch's testimony reinforces the conclusions reached in the foregoing discussion that electoral board members and the general registrar are arms of the state. Insofar as the policies themselves are concerned, the one issued by Republic to Scott County clearly excludes state employees from coverage. "Insured" under the definitions section of that policy is restricted to the public entity and

those persons who were, now or shall be duly elected or appointed officials or members or employees of the Public Entity or of commissions, boards or other units operating by or under the jurisdiction of the Public Entity and within an apportionment of the total operating budget of the Public Entity indicated in the proposal form.

The electoral board and the general registrar are appointed officials but are not, as this Court's foregoing discussion has indicated, operated by or under the control of the county. Though the electoral board and registrar's office are included as separate line items in the county budget, Ms. Lynch in her deposition confirmed that the state mandates compliance with a uniform accounting system which was established by and is regulated by the state. Thus, counties have no choice but to conform in order to, among other things, receive the reimbursements provided for by state law. Under the circumstances, it is obvious that the public official liability insurance policy issued to Scott County by Republic does not and was never intended to cover electoral board members or the general registrar.

In contrast, coverage as stated in Sections I and II of the Compass policy by definition extends to each "Insured", i.e. "each person who is duly constituted by or for the Commonwealth of Virginia as a State employee." "State employee" is defined as "any officer, employee, agent or any person acting in an official capacity, temporarily or permanently in the service of the Legislative, Executive or Judicial Branches of the Commonwealth, whether with or without compensation and whether full or part-time." Once one qualifies as an "Insured", the policy in relevant part covers all claims "arising out of the Insured's activities in his professional capacity" and includes the payment of obligations incurred pursuant to 42 U.S.C. §§ 1983 and 1988. The policy specifically excludes several offices from coverage, including most "[o]fficers and employees of political subdivisions of the Commonwealth." Thus, were the electoral boards and general registrars county employees, there would be no coverage by

Compass. Pursuant to my conclusions regarding their employment status, however, the damages awarded by the juries in the *Kilgore*, *McConnell*, and *Burchett* matters are payable under the Compass policy.

The Clerk is directed to send certified copies of this Memorandum Opinion to all counsel of record.

ORDER

In accordance with the jury verdicts rendered in the cases docketed at 83-0090-B and 85-0065-B, this Court's memorandum opinions and orders entered in those matters on December 7, 637 F.Supp. 1241, and December 18, 1985, 637 F.Supp. 1249, and the Memorandum Opinion accompanying this Order, it is hereby ADJUDGED and ORDERED that:

1. In the *Kilgore/McConnell* case, Civil Action No. 83-0090-B, judgment in the amount of \$76,348.50 plus interest at the rate of 7.70% per annum from July 9, 1985, the date of the verdict, until paid is entered in favor of Kilgore against McClelland and Owens, jointly and severally. Judgment in the amount of \$79,399.89 plus interest at the rate of 7.60% per annum from July 11, 1985, the date of the verdict, until paid is entered in favor of McConnell against Adams and Bacon, jointly and severally. The judgment is rendered against these Defendants in their individual and official capacities. Because the Commonwealth of Virginia, however, has immunity the judgment shall not be collectible from it, but Compass Insurance Company, Defendants' insurers, shall be liable for payment of the judgment.

2. In the *Burchett* case, Civil Action No. 85-0065-B, judgment in the amount of \$40,000.00 plus interest at the

rate of 7.91% per annum from September 12, 1985, the date of the verdict, until paid is entered in favor of Burchett against Cheek. The judgment is rendered against this Defendant in his individual and official capacity. Because the Commonwealth of Virginia, however, has immunity, the judgment shall not be collectible from it, but Compass Insurance Company, Defendant's insurer, shall be liable for payment of the judgment.

3. Judgment is entered in the *Burchett* matter (Civil Action No. 85-0065-B) for the County of Lee against Plaintiff.

4. In the declaratory judgment action (Civil Action No. 83-0223-B), judgment is entered for Plaintiffs against Compass Insurance Company and for Republic Insurance Company against Plaintiffs.

5. The injunctive relief ordered in the *Kilgore/McConnell* matter, Civil Action No. 83-0090-B, on December 7, 1985, and in the *Burchett* matter, Civil Action No. 85-0065-B, on December 18, 1985, is hereby confirmed. The judgments entered in paragraphs 1 and 2 of this Order shall be reduced in accordance with the December orders for any of these Plaintiffs who resume office prior to April 1, 1987.

6. Although the issue of attorneys' fees has not yet been resolved but is deferred until a later time, the judgments entered hereby are nevertheless final and the Clerk shall strike the above-captioned cases from the active docket of this Court.

APPENDIX D

CONSTITUTION OF THE UNITED STATES

[AMENDMENT I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

VIRGINIA STATUTES

§ 24.1-29. *Appointment, term and oath of members; vacancies; election of chairman and secretary; duty of secretary.*—There shall be in each county and city an electoral board, composed of three members, who shall be appointed by a majority of the circuit judges of the judicial circuit for such county or city. If a majority of such judges cannot agree, the senior judge shall make such appointment. Any vacancy occurring in the boards shall be filled by the same authority for the unexpired term. The clerk of the circuit court shall send to the State Board of Elections a copy of each order making an appointment to an electoral board. In the appointment of the electoral board, representation shall be given to each of the two political parties having the highest and next highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election. A majority of the electoral board shall be from the political party which cast the highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election. When the Governor was not elected as the candidate of a political party, representation shall be given to each of the political parties having the

highest and next highest number of members of the General Assembly at the time of the appointment and a majority of the board shall be of the political party having the highest number of members in the General Assembly. The political party entitled to the appointment may make and file recommendations with the judges for the appointment. Such recommendations shall contain the names of at least three qualified voters of the county or city.

The members of the board shall be appointed for a term of three years. The board shall elect one of its members chairman and another secretary. The chairman and the secretary shall represent different political parties, unless the representative of the political party having the second highest number of votes declines in writing to accept either of such offices. The members of the board shall qualify by taking and subscribing the oaths as set forth in Article II, § 7, of the Constitution before entering upon their term of office. Whenever any secretary of the electoral board is elected he shall at once notify the Board of Elections of his election and inform it of his post office address and telephone number. The secretary shall also inform the Board of Elections of the names, post office addresses and telephone numbers of the other members of the electoral board.

Members of the boards are to be appointed on a staggered term basis, one term to expire at midnight on the last day of February each year. In counties and cities where terms are not so staggered, appointments shall be made as follows: If all three terms expire at midnight on the last day of February of the same year, in that year only one member shall be appointed for a three-year term, one member for a four-year term and one member for a five-year

term; if two terms expire at midnight on the last day of February of the same year, in that year only one member shall be appointed for a three-year term and the other for either a four-year or five-year term whichever will not coincide with the end of the term of the member in office. If any member has been appointed for a term other than one to expire at midnight on the last day of February, his successor shall be appointed for a term to expire at midnight on the last day of February of the year that preserves the staggered terms of the board. (Code 1950, §§ 24-29, 24-32, 24-33, 24-42; 1970, c. 462; 1971, Ex. Sess., c. 204; 1973, c. 30; 1975, c. 515; 1978, c. 778; 1980, c. 639; 1984, c. 480.)

§ 24.1-30. *Meetings; quorum; notice; account of proceedings; seal; records open to inspection.*—The electoral board of each city and county shall convene in regular session at such time during the first week in the month of February and in the month of March of each year as the board may prescribe, and at any other time upon the call of any member of the board, and at any special meeting the board shall have the same powers as at a regular meeting. At any session two members shall constitute a quorum. Notice of all meetings shall be given to all members of the board either by the secretary of the board or the member calling the meeting at least one day prior to said meeting. Notice may be waived only by agreement of all of the members of the board.

The secretary of each electoral board shall keep, in a book to be provided for that purpose, an accurate account of all the proceedings of the board, including all appointments and removals of registrars and officers of election. The secretary shall keep in his custody the duly adopted

seal of the board which shall be used for sealing the ballots as provided by § 24.1-117.

All books, papers, and records of the board shall be open to the inspection of any qualified voter at the office of the board, or if the board does not have an office at the office of the secretary of the board or the office of the general registrar. Such books, papers and records shall be available for inspection when such office is open for business and at such other times and days as may be fixed by the secretary of the board. Except, however, that during the period thirty days prior to an election such books, papers and records shall be available only to one duly designated representative of each nominee or candidate. (Code 1950, §§ 24-34, 24-43; 1970, c. 462; 1978, c. 778; 1979, c. 27; 1982, c. 290.)

§ 24.1-32. *Appointment of officers of election and general registrars by board.*—Each electoral board shall appoint the officers of election for its city or county, including the towns therein. Before any officer of election shall enter upon the performance of the duties imposed upon him by law he shall take and subscribe the oath prescribed in the Constitution. Each electoral board shall also appoint a general registrar. In appointing the officers of election, representation shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and next highest number of votes, such representation at each precinct having an even number of officers of election to be equal and at each precinct having an odd number of officers of election to vary from equality by no more than one.

Members of electoral boards, officers of election, general registrars, and assistant registrars shall be deemed,

for all purposes, except as otherwise specifically provided by state law and including rules and regulations of the State Board of Elections, to be employees of the respective cities or counties in which they serve. Assistant registrars who agree to serve without pay shall not be deemed to be either state or local employees for any purpose. (Code 1950, §§ 24-30, 24-199; 1970, c. 462; 1975, c. 515; 1978, c. 778; 1980, c. 639; 1982, c. 650; 1986, c. 558.)

§ 24.1-35. *Information to be submitted to State Board of Elections.*—If requested by the State Board of Elections, it shall be the duty of the secretary of the electoral board, on the first day of January and July in each year or as often as required by the State Board of Elections, to transmit to the State Board of Elections the following: the number of new registered voters for the period; the number of voters transferred to or from the jurisdiction during the period; the number of voters stricken or purged from the books during the period; a list of the number of election districts in the county or city and the number of voters for each district; and such other information as requested by the State Board of Elections. The secretary of the electoral board may delegate this duty to the general registrar. (Code 1950, § 24-255; 1970, c. 462; 1974, c. 428.)

§ 24.1-43. *Appointment, qualifications, oath and compensation of general registrar; office to be furnished; prohibition as to office holding.*—Each electoral board in the Commonwealth at its regular meeting in the first week in the month of March, 1983, and every four years thereafter, shall appoint a general registrar, who shall be a qualified voter of the jurisdiction for which he is appointed; however, if the terms of all members of the electoral board

expire in the same calendar year that the term of the general registrar expires, the appointment of a successor general registrar shall be made by the newly appointed electoral board as soon as practicable and the general registrar whose term expires in such year shall continue in office until a successor is duly appointed and qualified. Such general registrar shall not hold any other office, by election or appointment, during his term; however, with the consent of the electoral board, other duties not inconsistent with law may be undertaken by the general registrar, provided such other duties do not conflict with his duties as general registrar. General registrars shall not serve as officers of election. The electoral board shall fill any vacancy that may occur in the office of general registrar.

Each general registrar, before entering upon the duties of his office, shall take and subscribe, before some officer authorized by law to administer oaths, the oath of office prescribed in the Constitution of this Commonwealth. He shall subscribe such oath and file it in the clerk's office of the circuit court, and such registrar shall file a copy of such oath with the secretary of his electoral board.

Each local governing body shall furnish the general registrar with suitable office space owned or leased by the county or city, adequately furnished, located within the county, or within any city in which the county courthouse is located, or city, and with postage, stationery, equipment, telephone, and office supplies as may be necessary. The telephone number shall be listed in the local telephone directory separately or under the local governmental list-

ing under the designation "Voter Registration." The public registration site shall be clearly marked. In the selection of registration sites, consideration shall be given to facilities accessible to the handicapped and elderly, as defined in § 24.1-97, so that a reasonable number of such facilities may be provided. Reasonable expenses, including reimbursement for mileage at the rate payable to members of the General Assembly, for general registrars, as approved by the State Board of Elections, shall be paid by the local governing body.

General registrars shall receive as annual compensation for their services a sum in accordance with the compensation plan set forth in the Appropriations Act.

Such sum is to be paid by the governing bodies of the counties and cities for which the governing bodies shall be reimbursed annually from the state treasury.

The local governing body shall supplement the salary of any general registrar whose office, on July 1, 1974, has a salary scale provided by a county or city higher than that determined by the State Board of Elections for such office, until the state salary scale is equal to or higher than that of such county or city. There shall be no reimbursement out of the state treasury for such supplements. No other additional compensation shall be paid to the general registrar by the local governing body. Salary scales in the affected counties or cities shall be adjusted, in accordance with the population, by the State Board of Elections in any annexation or consolidation order by a court when such order becomes effective.

Normal days of service per week for each general registrar shall be determined by the State Board of Elections.

No general registrar shall be eligible to offer for or hold an office to be filled by election solely by the qualified voters of his jurisdiction at any election during his term. (Code 1950, §§ 24-52, 24-52.1, 24-55, 24-61, 24-65, 24-66, 24-118.1; 1954, c. 691; 1962, c. 475; 1964, c. 608; 1968, cc. 97, 141; 1970, c. 462; 1973, c. 30; 1974, c. 428; 1975, c. 515; 1976, c. 12; 1978, c. 778; 1981, c. 425; 1982, c. 290; 1983, c. 511; 1984, c. 480; 1985, c. 197.)

§ 24.1-44. *Term of office and disqualification of registrar.*—The term of office of the general registrar shall begin on April 1, 1983, and every four years thereafter, and shall continue until a successor is duly appointed and qualified. The appointment or election of a general registrar to any other office shall vacate the office of general registrar. (Code 1950, § 24-53; 1958, c. 576; 1970, c. 462; 1982, c. 290.)

§ 24.1-45. *Assistants to general registrars.*—The electoral board shall determine the number and set the term for assistant registrars provided that the term of an assistant registrar shall not extend beyond the term set by law of the incumbent general registrar. The general registrar shall establish the duties of assistant registrars, appoint assistant registrars, and have authority to remove any assistant registrar who fails to discharge the duties of his office.

In cities and counties whose population is over 15,500, there shall be at least 1 assistant registrar who shall serve at least 1 day each week in the office of the general registrar.

Localities with populations of less than 15,500 shall have 1 substitute registrar who is able to take over the

duties of the general registrar in an emergency and who shall assist the general registrar upon request.

All assistant registrars shall be appointed by the general registrar and shall have the same limitations and qualifications and fulfill the same requirements as the general registrar except that an assistant registrar may be an officer of election. Assistant registrars who agree to serve without pay shall be subject to the supervision of and training by the general registrar. All other employees shall be employed by the general registrar.

The general registrar may hire additional temporary employees to work in the office of the general registrar on a part-time basis as needed.

The compensation of any assistant registrar, other than those who agree to serve without pay, or any other employee of the general registrar shall be fixed and paid by the local governing body and shall be the equivalent of or exceed the minimum hourly wage established by federal law in 29 U.S.C. § 206(a)(1), as amended. (Code 1950, § 24-58; 1970, c. 462; 1973, c. 30; 1974, c. 428; 1975, c. 515; 1982, c. 650; 1983, c. 470; 1984, c. 480.)

§ 24.1-45.1. *Special assistant registrars.*—The general registrar of any city or county may appoint as a special assistant registrar any person who, although not being a qualified voter of such city or county, has served continuously for more than ten years in the office of the registrar of such city or county as a deputy or assistant registrar. The compensation of any such special assistant registrar shall be fixed and paid by the local governing body. (1971, Ex. Sess., c. 119; 1975, c. 515.)

§ 24.1-46. *Duties of general registrar.*—In addition to the other duties provided by law, it shall be the duty of the general registrar to:

(1) Maintain the principal public office provided by the local governing body and to establish and maintain such additional public places for the registration of voters as are designated by the electoral board. No registrar shall actively solicit any application for registration or any application for ballot or offer anything of value for any such application, but this prohibition shall not be construed to prohibit the participation of registrars in programs to educate the general public or to encourage registration by the general public.

(1a) Remain within the territorial limits of the county or city for which he was appointed to register voters, except that a registrar may go into a county or city in the Commonwealth contiguous to his county or city to register voters of his county or city when conducting registration jointly with the registrar of the contiguous county or city.

(1b) Accept the registration application from a resident of any county or city in the Commonwealth contiguous to his county or city and promptly forward the completed application to the registrar of the applicant's residence who shall then determine the qualification of any applicant whose application was accepted hereunder prior to or on the final day of registration and who shall notify the applicant at the address shown on the application of the acceptance or denial of his registration.

(2) Provide the appropriate forms for application to register and to obtain the information necessary to

complete the application pursuant to the provisions of the Constitution. The general registrar and any assistant registrar shall be authorized to administer any oath required for purposes of registration.

(3) Maintain, only in the principal office of the general registrar, true and accurate, separate books containing the names of registered voters in alphabetical order for each election district within his jurisdiction and make them available for all elections in such districts.

(4) Maintain in his office suitable books containing lists in alphabetical order of persons registered and carry out such other duties as prescribed by the electoral board.

(5) Certify the list of election districts, the number of voters and information as required by the State Board of Elections.

(6) Preserve as part of the official records the written applications of all persons who are registered and preserve for a period of two years the written applications of all persons who are denied registration.

(7) If a person is refused registration, notify such person in writing of such refusal and the reason forthwith.

(8) Upon being informed and determining that a voter is registered in a precinct, election district, county or city, in which he no longer resides, if such voter be within the same jurisdiction, transfer such voter and notify him by mail of such change. If such voter be without the jurisdiction, the general registrar shall notify such voter of the voter's duty to transfer to the election district of his residence, and if such voter fail to comply with the

law, remove such voter's name by purge as provided by § 24.1-60.

(9) In the event that election districts are rearranged or a new district created, cause the names of those registered voters residing in the rearranged or new districts to be placed on the books and lists for the proper election district and notify such voters by mail of the changes.

(10) In the event that through annexation, merger or similar means an area in which registered voters reside becomes a part of another election district, county or city, furnish to the appropriate general registrar lists of registered voters so affected. Such registered voters shall be placed on the registration books of the new election district, county or city, so notified by mail, and stricken from the registration books of the general registrar so transferring them.

(11) In the event of registration of a qualified voter, who was previously registered in another state, notify the appropriate authority of the last place of previous registration of such new registration. Such notice shall be upon a form prescribed or approved by the State Board of Elections.

(12) Strike from the list of voters the names of all persons who are deceased and the names of all persons known to him to be disqualified to vote, as provided in the Constitution, unless such disability has been removed as provided by law. The various records concerning such names shall be retained for a period of two years.

(13) Purge the registration books pursuant to §§ 24.1-59 through 24.1-62 and maintain accurate books of

registered voters. A voter's name may be removed from the registration records pursuant to § 24.1-60 at any time during the year at which the registrar discovers that such person is no longer entitled to be registered in such district, except within sixty days of the general election in November or within thirty days of any other election in such district.

(14) Whenever the registration books in any election district are so mutilated, blotted, defaced, or otherwise in such condition as to render it difficult, troublesome or unsafe to use them longer, the electoral board shall then order, or may at any time order, that the books shall be copied, cause fair copies to be made of the old registration books, and they shall take the place of the old books. The general registrar shall preserve the old books.

(15) Upon request of the local governing body, to inform in writing only those duly designated local governmental agencies or departments the names and addresses of all new registered voters, all those removed from the registration lists and all those changes of address occurring within the period requested or within the previous year, whichever is the lesser period, to be used for city, county, or town purposes only.

§ 24.1-49. *Final registration day; other hours and places for registration; notice.*—The principal office of each general registrar shall be open a minimum of one day per week or pursuant to § 24.1-43. The general registrar shall publish annually the location and time that the office will normally be open each week.

Each general registrar in the Commonwealth shall, thirty-one days before the day fixed by law for every

regular primary election and every general election which will be held in his jurisdiction, hold a final day of registration for such election. On such final day of registration, the principal office and all scheduled registration places shall be open a minimum of eight hours and shall be closed at five o'clock p.m. The registrar shall make a list by name of those persons, if any, in line at five o'clock and shall permit such persons to complete an application to register or to make any necessary changes to their registration records as required by law.

The general registrar shall give notice of the time and place at which he will sit for the final day of registration at least ten days before each day.

Additional hours, if any, that the office is to be open for registration of qualified voters may be determined and set by the general registrar or the electoral board.

The general registrar in each county or city shall set additional public places other than the principal office for registration at one or more times within the forty days immediately preceding the final day of registration prior to each November general election. The required number of separate and additional registration places for each county or city shall be not more than 20 and up to this number there shall be at least 1 additional place set in each county or city for each 5,000 of population. Such places shall be geographically dispersed throughout the county or city, and times for registration at such places shall be scheduled, to the extent possible, after five o'clock p.m. or on weekends. Each general registrar shall file the plans for these additional places and the hours each such additional place will be open with the State Board of Elections by the immediately preceding August 15.

The general registrar or electoral board may set other times and places in public places for registration.

The appearance by the general registrar or assistant registrar in public places at preannounced hours shall not be deemed solicitation of registration.

Any public place set for registration, other than the principal office of the general registrar, shall constitute an additional registration place.

Assistant registrars should serve during such additional hours and at such other places.

Notice of any such additional locations or hours shall be published by the general registrar annually or at least seven days before the day on which such additional hours or places are to be provided. Any such annual notice shall contain the schedule of such additional times and places for registration for the following year.

Any notice required by this section shall be posted at the courthouse and published at least once in a newspaper of general circulation in the county or city. (Code 1950, §§ 24-74 through 24-76, 24-78; 1963, Ex. Sess., c. 2; 1970, c. 462; 1975, c. 515; 1976, c. 616; 1984, c. 480; 1985, c. 530.)

§ 24.1-55.1. *How certain votes treated.*—When a person offers to vote pursuant to § 24.1-55 and the general registrar cannot state that he is registered to vote, then such vote shall be allowed by paper ballot in the manner provided for herein.

Such person shall be given a ballot and a green envelope provided by the State Board of Elections, bearing on the outside such identifying information as required by the Board. He shall then and there, in the presence of an

officer of election, mark the ballot, as provided in § 24.1-129, and without making known the manner of marking same, seal it in the envelope provided, on which the officer shall complete the information required. The envelope containing the ballot shall then be placed in the ballot box by an officer of election.

The voter shall be informed that a determination of his right to vote shall be made on the following day in the general registrar's office, or some other designated room in the courthouse in the county or city and shall be advised of the time at which such determination shall commence. (1975, c. 515.)

§ 24.1-55.2. *Duty of electoral board and registrar concerning certain votes.*—Notwithstanding any provision of law to the contrary, when votes are counted, those votes cast pursuant to § 24.1-55.1 shall, in their unopened envelopes, be sealed in a special envelope marked "Challenged Votes," inscribed with the number of envelopes contained therein and subscribed by the officers of election who counted them. Such envelopes shall by noon of the day following the election be delivered to the clerk of the circuit court who shall immediately deliver all such envelopes to the secretary of the electoral board.

The members of the electoral board shall proceed to determine whether each person having cast such a ballot was entitled to do so. One authorized representative of each political party or independent candidate in a general election or one authorized representative of each candidate in a general election or one authorized representative of each candidate in a primary or special election, who is a qualified voter of the city or county, shall be permitted

to remain in the room in which the determination is being made so long as he does not hinder, delay or otherwise impede the orderly conduct of the determination.

If the electoral board determines that such person was not entitled to vote, or is unable to determine his right to vote, the envelope containing his ballot shall not be opened and his vote shall not be counted. The general registrar shall notify in writing pursuant to § 24.1-46 those persons found not properly registered.

If the electoral board determines that such person was entitled to vote, the envelope shall be opened and the ballot placed in a ballot box without any inspection further than that provided for in § 24.1-131.

Upon completion of its determination, the electoral board shall proceed to count such ballots and certify the results of such count. Such certified results shall be added to those found pursuant to § 24.1-146.

The certification of the results of the count together with all ballots and envelopes, whether open or unopened, and other related material shall be delivered by the electoral board to the clerk of the circuit court and retained by him as provided for in §§ 24.1-143 and 24.1-144 (1975, c. 515; 1982, c. 650.)

§ 24.1-56. *Books open to public inspection.*—Registration books shall be kept and preserved by the general registrar and shall be opened to the inspection of any qualified voter at the office of the registrar when the office is open for business. In addition, such book shall be available for inspection upon appointment, which appointment the general registrar shall make for all reason-

able times requested. In any event, such books shall be available at additional days and times fixed by the secretary of the electoral board. (Code 1950, § 24-113; 1970, c. 462.)

§ 24.1-105. *Appointment, terms, etc., of officers of election.*—It shall be the duty of the electoral board of each city and county, at their regular meeting in the first seven days of the month of February each year, to appoint, in conformity with the requirements of §§ 24.1-32 and 24.1-106, officers of election whose terms of office shall begin on the first of March following their appointment, and continue for one year or until their successors are appointed. Not less than three competent citizens shall be appointed for each precinct and, insofar as practicable, each officer shall be a qualified voter of the precinct he is appointed to serve, but in any case a qualified voter of the city or county. Officers of election so appointed shall serve for all elections held in their respective precincts during their terms of office except that, for a primary election involving only one political party, persons representing the political party holding such election shall be the only officers of election in any county or city in which said political party has submitted a list or lists of persons as provided in § 24.1-106. The electoral board shall designate one officer as the chief officer of election and one officer as the assistant for each precinct. The officer designated as the assistant for a precinct, whenever practicable, shall not represent the same political party as the chief officer for such precinct. It shall be the duty of the electoral board to instruct each chief officer and each assistant in his duties not less than three nor more than

fourteen days before each election. Each electoral board may instruct each officer of election in his duties not less than three nor more than thirty days before each November general election. If any person so appointed is for any reason unable to serve at any election during his term of office, the electoral board may at any time appoint a substitute who shall hold office and serve for the unexpired term. A list containing the names of election officers so appointed shall be made available for inspection and posted in the general registrar's office in the county or city for which they are appointed prior to the date on which their term of office begins. The mere failure to so appoint shall not render void any election. (Code 1950, § 24-193; 1950, p. 164; 1970, c. 462; 1972, c. 620; 1976, c. 616; 1978, c. 330; 1980, c. 639; 1984, c. 480.)

§ 24.1-106. *Qualifications of officers of election.*—Whenever it is possible to do so, the persons appointed officers of election shall be chosen for each polling place from a list of names of persons who are competent, of good moral character, and qualified to serve in the precinct, if submitted by the two political parties casting the highest and next highest number of votes at the last gubernatorial election. Such nominations shall be made to the secretary of the electoral board at least ten days prior to the first day of February of each year. (Code 1950, § 24-195; 1970, c. 462; 1980, c. 639; 1984, c. 480.)

ARTICLE 6.

Voting Machines.

§ 24.1-203. *Governing bodies shall acquire machines or systems; time schedule.*—The governing bodies of every

county and city in this Commonwealth shall adopt for use at elections, within the time and for those precincts as set forth herein, any kind or type of mechanical voting machine or electronic voting system that has been approved by the State Board of Elections, and shall use such voting machines or systems at any and all elections held in such county or city or any parts thereof, for voting, registering and counting votes cast at such elections, except that towns with 500 or fewer registered voters may choose to conduct a town election with paper ballots in lieu of such machines or systems.

The governing bodies of all counties having optional forms of government and of all cities shall adopt and acquire for use such voting machines for all precincts and election districts within such county or city prior to October 1, 1972. All other counties shall adopt and acquire for use such voting machines for all precincts or election districts within such county containing 750 or more registered voters prior to October 1, 1976. No county shall divide or create precincts or election districts so that resulting precincts or election districts will contain less than 750 registered voters, in order to avoid the requirements of this section. .

Such governing bodies shall purchase, lease, lease purchase, or otherwise acquire such voting machines or systems and may provide for the payment therefor in such manner as they may deem proper. Voting machines or systems of different kinds may be adopted for use and be used in different districts of the same county or city subject to the approval of the State Board of Elections.

Any county required to acquire voting machines prior to October 1, 1976, may acquire such machines for precincts or districts containing less than 750 registered voters. (Code 1950, § 24-291; 1970, c. 462; 1971, Ex. Sess., c. 119; 1972, c. 620; 1974, c. 428; 1976, c. 616; 1982, c. 650; 1985, c. 458.)

§ 24.1-228.1. *Application for absentee ballots.*—It shall be the duty of the electoral board of each county or city to furnish the general registrar with a sufficient number of applications for official ballots on forms prescribed by the State Board of Elections; and it shall be the duty of such registrars to furnish application forms, in person or by mail, to any person requesting the same.

All applications for absentee ballots shall be made to the appropriate registrar (i) not less than three days prior to the election in which the applicant offers to vote if completed in person in the office of the registrar, or (ii) not less than five days prior to the election in which the applicant offers to vote if applying by mail or other means. A separate application shall be completed for each election in which the applicant offers to vote. No application shall be made more than ten months prior to the election for which the ballot is requested. Any application received before the ballots are printed for the election in which the applicant offers to vote shall be held and processed as soon as the printed ballots for the election are available.

All applications for absentee ballots shall be signed in the presence of one subscribing witness by the applicant who shall subscribe the same and vouch under the penalty of perjury, that to the best of his knowledge and belief the facts contained in the application are true and correct and

that he has not and will not vote in the election at any other place in Virginia or in any other state.

Applications for absentee ballots shall be as follows:

1. An application completed in person shall be completed only in the office of the registrar or secretary (such registrar's office to be open a minimum of eight hours between the hours of 8:00 a.m. and 5:00 p.m. on the first and second Saturdays immediately preceding all general or primary elections and on the Saturday immediately preceding any special election) and shall be made on a form furnished by the registrar and signed by the applicant in the presence of either the registrar or the secretary of the electoral board.

2. Any other application may be made by mail or other means and shall be on a form furnished by the registrar or, if made under § 24.1-227 (2) may be on a Federal Post Card Application in conformity with § 1464 of Title 50 of the United States Code, either of which applications shall be signed by the applicant in the presence of one subscribing witness.

3. Any application made under § 24.1-227 shall contain the following appropriate information:

- a. The reason why the applicant will be absent or cannot vote at his polling place on the day of the election;

- b. A statement that he is duly registered in the county or city in which he offers to vote and his residence address in such county or city; provided, however, that any person who makes application under § 24.1-227 (2) who is not a registered voter, shall be allowed to register, pursuant to § 24.1-48, by absentee application. In such event the registrar shall supply or correct technical in-

formation contained in either application, such as precinct names and number, to the end that such persons have the fullest opportunity possible to exercise their privilege of voting;

e. The complete address to which the ballot is to be sent provided that the application is not made in person at a time when the printed ballots for the election are available; and

d. In the case of an applicant or the spouse or dependent of an applicant who is on active service as a member of the armed forces of the United States or a member of the Merchant Marine of the United States, the branch of service to which he or the spouse belongs, and his or the spouse's rank, grade, or rate, and service identification number; or

e. In the case of a person, or the spouse or dependent accompanying such person, who is regularly employed outside the continental limits of the United States, the name and address of his employer; or

f. In the case of a student or the spouse of a student attending a school or institution of learning, the name and address of such school or institution of learning; or

g. In the case of a person who is unable to go in person to the polls on the day of the election because of a physical disability or physical illness, the nature of the illness or disability; or

h. In the case of a person who is confined awaiting trial or due to conviction of a misdemeanor, the name and address of the institution of confinement. (Code 1950, § 24.1-228; 1970, c. 462; 1971, Ex. Sess., c. 119; 1972, cc.

620, 621; 1973, c. 30; 1974, c. 428; 1975, c. 515; 1977, c. 490; 1978, c. 778; 1980, c. 639; 1981, c. 425; 1982, c. 650; 1983, c. 461.)

§ 24.1-229. *Duty of registrar and electoral board upon receipt of application; oath of voter.*—The general registrar, upon receipt of the application for a ballot, if the applicant is duly registered shall enroll the name and address of the applicant on the list to be made and kept by him for the purpose, and such list shall be a public record from the receipt of the first application and shall be available for public inspection and copying during office hours. The registrar shall note on the application that the applicant is or is not a registered voter and forthwith notify the secretary of the electoral board of its receipt. If it then appears to the electoral board that the applicant is a resident and registered voter of the precinct in which he offers to vote, the electoral board shall immediately send to the applicant by mail, obtaining a certificate of mailing, or deliver to him in person in the office of the secretary or registrar, the following items and nothing else; provided, however, that if the applicant makes his application to vote in person under paragraph 1 of § 24.1-228.1 at a time when the printed ballots for the election are available, the registrar or the secretary of the electoral board, upon the determination of the qualification of the applicant to vote, shall deliver the following items only to the applicant himself in proper person and unless such applicant offers to vote only for electors of President and Vice-President of the United States no item shall be removed by the applicant from the office of the registrar or the secretary of the electoral board:

(a) An envelope containing the folded ballot, sealed and marked "ballot within. Do not open except in presence of a witness."

(b) An envelope for resealing the marked ballot, on which is printed the following:

"Oath of Voter."

"I do solemnly swear (or affirm) under penalty of perjury that my full name is _____, that I am a citizen of the United States, a qualified voter of the Commonwealth of Virginia, duly registered in the county or city of _____ (or my application for absentee registration accompanies this ballot envelope), that I am now or have been at some time since the last November general election an actual resident of _____ (address of residence where registered to vote), that I am at least eighteen years of age (or will be on the — day of —), that the enclosed ballot was received by me upon my application to the registrar of such county or city, that the envelope marked 'ballot within' was opened by me in the presence of _____, witness, marked while in his presence, without assistance or knowledge on the part of anyone as to manner in which same was prepared, and then and there sealed as provided by law, that I have not voted in this election at any other time or place, and that I will not vote in this election elsewhere.

Signature of Voter _____

Date _____

Signature of witness _____"

(c) A properly addressed envelope for the return of the ballot to the electoral board by mail or by the applicant in person.

(d) Printed instructions as to the manner of completing the ballot and oath on the envelope for the return of the ballot and how the same shall be returned.

The covering and return envelopes shall be in the form prescribed by the State Board of Elections.

If the applicant states as the reason for his absence on election day any of the reasons set forth in subsection (2) of § 24.1-227, the electoral board shall mail or deliver in person to the applicant in the office of the secretary or registrar, the items as set forth in (a) through (d) above and an application for registration pursuant to § 24.1-48 if necessary. A certificate of mailing shall not be required.

The completion and timely delivery of an application for an absentee ballot shall be construed to be an offer by the applicant to vote in the election.

When the oath prescribed in (b) above has been properly subscribed by a duly registered voter, his ballot shall not be subject to challenge pursuant to § 24.1-133 of the Code. (Code 1950, §§ 24-327, 24-332, 24-333, 24-345.6, 24-345.7; 1952, c. 509; 1956, c. 525; 1958, c. 351; 1970, c. 462; 1971, Ex. Sess., cc. 119, 247, 265; 1972, c. 620; 1974, c. 428; 1975, c. 515; 1977, c. 490; 1978, c. 778; 1980, c. 639; 1981, c. 425; 1983, c. 461.)

§ 24.1-230. *Ballot to be returned in manner prescribed by law.*—Any ballot returned to a member of the electoral board at the office of the secretary or the registrar in any manner except as prescribed by law, shall be void. The board shall mark on each envelope the date, time and manner of delivery. In the event that the ballot

is returned to the general registrar, he shall mark the date, time and manner of delivery to him. For all ballots returned by the general registrar to the electoral board, the board shall give to the general registrar a receipt showing the time and date of such return. (Code 1950, § 24-328; 1956, c. 525; 1970, c. 462; 1971, Ex. Sess., c. 119; 1975, c. 515.)

§ 24.1-231. *Registrar to make lists of applicants; delivery of copy to electoral board.*—Before each election the general registrar shall make out in triplicate on a form prescribed by the State Board of Elections a list of the names and addresses by precinct of all persons who have applied to him for such ballots and shall by 12:00 o'clock noon on the day before any election deliver two copies to the electoral board, and post a copy in the office of the general registrar. Such electoral board and general registrar shall maintain such lists in his office for a period of twelve months as public records open to public inspection during office hours.

On the morning of the day of election on which the ballots are to be offered, the electoral board shall post true copies of the lists required herein and by §§ 24.1-233.1 and 24.1-234 in conspicuous places at the polling place of the respective proper precincts.

The electoral board shall, within ten days after the day of election, forward to the State Board of Elections a certificate setting forth the number of persons whose names appear upon each precinct list required by § 24.1-234 and also the number of persons whose names appear upon all such lists for the county or city. Code 1950, §§ 24-330, 24-338.1, 24-339, 24-345.8; 1952, c. 509; 1954,

c. 509; 1954, cc. 511, 523, 539; 1956, c. 525; 1962, c. 536; 1964, c. 557; 1970, c. 462; 1972, c. 621; 1974, c. 428.)

§ 24.1-232. *How ballots marked and returned; ballots cast in person; how ballots cast on voting machines.*— Upon receipt of the absentee ballot forwarded by the electoral board, the voter shall not open the sealed envelope, marked “ballot within”, except in the presence of a witness, and shall then and there mark, as provide in § 24.1-129, and refold the ballot without assistance and without making known the manner of marking same. He shall then and there place the ballot in the envelope provided for the purpose, seal the envelope and fill in and sign the oath printed on the back of the envelope in the presence of a witness, who shall witness the same in writing. This envelope shall be enclosed within the envelope directed to the electoral board which shall then and there be sealed and mailed to the office of the electoral board, or delivered personally by the voter to the electoral board or the general registrar.

In the event that the applicant makes his application to vote in person under paragraph 1 of § 24.1-228.1 at a time when the printed ballots for the election are available, he shall follow the same procedure as set forth above except that it shall be done in person in the office of the secretary or general registrar, upon receipt of the items set forth in § 24.1-229, before either the registrar or the secretary of the electoral board, and failure to do so will render the applicant's ballot void.

The electoral board of any county or city using a central absentee voting district may provide for the casting

of absentee ballots on voting machines by applicants who are voting in person. The State Board of Elections shall prescribe procedures for such use of voting machines. (Code 1950, §§ 24-334, 24-337; 1956, c. 525; 1970, c. 462; 1972, c. 620; 1973, c. 30; 1974, c. 428; 1975, c. 515; 1978, c. 778; 1981, c. 425.)
